Office Supreme Court, U. S.
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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

October Term, 1894.

No. 947. 559

CENTRAL PACIFIC RAILROAD CO.,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

Motion by Defendant in Error to Advance Case for Hearing.
Notice of Motion and Affidavit.

W. F. FITZGERALD,
Attorney General of California.
J. P. LANGHORNE,
J. H. MILLER,
for Defendant in Error.

SAN FRANCISCO:
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1895

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

CENTRAL PACIFIC RAILROAD CO.,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.
No. 947.

Motion by Defendant in Error to Advance the Case on the Docket and to Have it Set Down for a Particular Day for Hearing.

Now comes the People of the State of California, the defendant in error in the above entitled case, and moves the above entitled Court for an order advancing said case on the docket of said Court and setting the same down for hearing on a particular day. Said motion is made on the following facts and grounds:

1. This case was instituted by the People of the State of California against the Central Pacific Railroad Company in the Superior Court of the State of California, in and for the City and County of San Francisco, to recover the State and County taxes alleged to be due and unpaid the State of California and eighteen Counties in said State, for the fiscal year 1887. The judgment of said Superior Court was in favor of the People of

the State of California. The Central Pacific Railroad Company appealed from said judgment to the Supreme Court of the State of California, which Court on the 6th day of January, 1895, affirmed the judgment of the lower State Court subject to certain modifications shown by the decision of said Supreme Court. On the 6th day of February, 1895, said Central Pacific Railroad Company sued out a writ of error from said decision of the Supreme Court of State of California to the Supreme Court of the United States, and in March, 1895, a transcript of the record on such writ of error was filed with the Clerk of this Court and the cased docketed therein. Defendant in error has entered its appearance herein.

2. That the special and peculiar circumstances existing as reasons for the advancement of this case on the docket of this Court are as follows:

(*a*) The plaintiff in error in its Assignment of Errors under said writ of error, and particularly in paragraphs I, II, III and XII thereof, claims that Sections 4 and 10 of Article XIII of the Constitution of the State of California and the statutes of the said State enacted thereunder providing for the assessment, apportionment and collection of State and County taxes upon the property of railroads operated in more than one county in said State, are illegal and void by reason of being in violation of Section 1 of the XIVth amendment to the Constitution of the United States. Such claim by plaintiff in error places in jeopardy and in a state of uncertainty the revenue system of the State of California provided by its Constitution and statutes, for the assessment, apportionment and collection of State and County taxes from railroads operated in more than one county in the State. Nearly all the railroads in said State are each operated in more than one county, and it appears from the official report of the Comptroller of said State for the year 1894, that the railroads so operated aggregate at least 4,430 miles within the State, that the revenues for the support of the State and County governments

are in a great measure derived from taxes upon railroads operated in more than one county, and that such taxes amounted in 1894 to at least $668,000.00. Therefore, it is a matter of great interest and importance to the people of the State of California to have this Court hear and finally determine as soon as possible, whether or not the said revenue provisions of the State Constitution and statutes of the State of California are in violation of the XIVth amendment to the Constitution of the United States.

(*b*) Under the said decision of the Supreme Court of the State of California there will be due the defendant in error by the plaintiff in error at the time of the hearing of this motion on the first Monday in October, 1895, principal and interest upon the judgment for taxes and percentage thereon, the sum of $368,734.00, exclusive of the amount allowed for counsel fees, and pending the determination of this case by this Court, the State of California and eighteen counties therein cannot collect their revenues under and awarded by said decision for the support of the State and county governments to their great inconvenience and loss, and therefore a speedy determination of this case by this Court is a matter of great importance to the People of the State of California.

3. The facts upon which the foregoing grounds for this motion are based, will more fully appear from the transcript of the record of the case on file and from the affidavit of J. P. Langhorne, of counsel for defendant in error, attached hereto and filed herewith, and said record and affidavit are hereby referred to and by such reference made a part of this motion.

W. F. FITZGERALD,
Attorney-General of the State of California.

J. P. LANGHORNE,
JOHN H. MILLER,
For Defendant in Error.

[Title of Court and Cause.]

Affidavit of J. P. Langhorne in Support of Motion to Advance Case.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss.

J. P. LANGHORNE, being first duly sworn, doth on oath depose as follows: That he is one of the attorneys and counsel for the People of the State of California, defendant in error herein. That this case was instituted by the People of the State of California against the Central Pacific Railway Company in the Superior Court of the State of California in and for the City and County of San Francisco, to recover the State and county taxes alleged to be due and unpaid the State of California and eighteen counties in said State for the fiscal year 1887. The judgment of said Superior Court was in favor of the People of the State of California. The Central Pacific Railroad Company appealed from said judgment to the Supreme Court of the State of California, which Court on the 6th day of January, 1895, affirmed the judgment of the lower State Court, subject to certain modifications shown by the decision of said Supreme Court. On the 6th day of February, 1895, said Central Pacific Railroad Company sued out a writ of error from said decision of the Supreme Court of the State of California to the Supreme Court of the United States, and in March, 1895, a transcript of the record on such writ of error was filed with the clerk of this Court and the case docketed therein. That defendant in error has entered its appearanee therein.

That the special and peculiar circumstances existing as reasons for the advancement of this case on the docket of this Court are as follows:

The plaintiff in error in its assignment of errors under said writ of error, and particularly in paragraphs I, II, III, and XII thereof, claims that Sections 4 and 10 of Article XIII of the Constitution of the State of California and the Statutes of said State enacted thereunder providing for the assessment,

apportionment and collection of State and County taxes upon the property of railroads operated in more than one County of said State, are illegal and void by reason of being in violation of Section 1 of the XIVth Amendment to the Constitution of the United States. Such claim by plaintiff in error places in jeopardy and in a state of uncertainty the revenue system of the State of California provided by its Constitution and Statutes for the assessment, apportionment and collection of State and County taxes from railroads operated in more than one County in the State. Nearly all the railroads in said State are each operated in more than one County, and it appears from the official report of the Comptroller of said State for the year 1894, that the railroads so operated aggregate at least 4,430 miles within the State; that the revenues for the support of the State and County Governments are in a great measure derived from taxes upon railroads operated in more than one County, and such taxes amounted in 1894 to at least $668,000.00. That it is therefore a matter of great interest and importance to the people of the State of California to have this Court hear and finally determine whether or not the said revenue provisions of the State Constitution and Statutes of the State of California, are in violation of the XIVth Amendment to the Constitution of the United States.

That under the decision of the Supreme Court of the State of California, there will be due the defendant in error by the plaintiff in error at the time of the hearing of this motion on the first Monday in October, 1895, principal and interest upon the judgment for taxes and percentage, the sum of $368,734.00, exclusive of the amount allowed for counsel fees, and pending the determination of this case by this Court, the State of California and eighteen Counties therein can not collect their revenues under and awarded by said decision for the support of the State and County Governments, to their great inconvenience and loss, and therefore a speedy determination of this

case by this Court is a matter of great importance to the people of the State of California.

Further deponent saith not.

J. P. LANGHORNE.

Subscribed and sworn to this 24th day of July, 1895, before me, Daniel Sloney Notary Public in and for the City and County of San Francisco, State of California.

[NOTARIAL SEAL.]

[Title of Court and Cause.]

Notice of Motion to Advance Cause.

To Central Pacific Railroad Company, Plaintiff in Error and to Mr. Chas. H. Tweed, its Counsel:

You will please take notice that the defendant in error by its Counsel, will on the first Monday in October, 1895, at the opening of the Supreme Court of the United States on that day, or as soon thereafter as Counsel can be heard, in the Court room of said Court, in the Capitol Building at Washington, District of Columbia, make and submit to the said Court, the foregoing motion in writing (hereto attached) to advance this case upon the docket of said Court and to have it set down for a particular day for hearing. Said motion will be made upon the facts and grounds set forth in said written motion which is hereby referred to and by such reference made a part of this notice. There will be used upon the hearing of said motion and submitted therewith the affidavit of J. P. Langhorne, hereto attached and the record on file with the Clerk of said Court in this case.

Respectfully,

W. F. FITZGERALD,
Attorney-General of the State of California.

J. P. LANGHORNE,
JOHN H. MILLER,
For Defendant in Error.

Supreme Court, U. S.
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CENTRAL PACIFIC RAILROAD CO., *Plaintiff in Error,* vs. PEOPLE OF THE STATE OF CALIFORNIA, *Defendant in Error.*	No. 559. October Term, 1895.
SOUTHERN PACIFIC RAILROAD CO., *Plaintiff in Error,* vs. PEOPLE OF THE STATE OF CALIFORNIA, *Defendant in Error.*	No. 560. October Term, 1895.

BRIEF FOR DEFENDANTS IN ERROR.

W. F. FITZGERALD,
Attorney-General of the State of California,
J. P. LANGHORNE,
J. H. MILLER,
For Defendants in Error.

GEO. SPAULDING & CO., PRS., 414 CLAY ST., SAN FRANCISCO.

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BRIEF FOR DEFENDANTS IN ERROR.

These cases having been advanced to be heard together in this Court, and the questions for argument being common to both, this brief, with the Court's permission, is filed as applicable to, and as the State's brief in each case.

These are actions at law brought originally by the State of California against the Central Pacific Railroad Company and the Southern Pacific Railroad Company, to recover the State and County Taxes alleged to be due and unpaid for the fiscal year 1887, together with interest, penalties, counsel fees and costs. The State trial Court gave judgment in each case in favor of the State. From these judgments, and from orders of the trial Court denying

new trials, the railroad companies appealed to the Supreem Court of California, which, on the 6th of January, 1895, affirmed the orders denying the motions for new trials; but modified the judgments of the trial Court by striking out the award of interest, and by striking out the counsel fee allowed Mr. A. R. Cotton, counsel employed by the former Attorney-General, W. H. Hart; but in all other respects the State Supreme Court affirmed the judgments of the trial Court; all of which appears from the opinion and decision of the State Supreme Court, set out in the record of the Central Pacific R. R. case, between pages 262 and 272, and reported in 105 Cal., p. 583. Thereupon, the railroad companies sued out the present writs of error to review said judgments.

With respect to the numerous assignments of error, sought to be reviewed in this Court, we desire to say at the outset that, while we shall endeavor to answer every alleged error on the merits, yet, in our opinion, but one Federal question is properly presented in the entire record of these cases, for determination by this Court; namely, whether or not the granting to these railroad companies of what are commonly called their Federal franchises operated so as to merge therein the State franchises previously granted to them, in such manner as to divest such State franchises of their property character, and prevent their taxation as property by the State. [The record references in this brief are made to the record in the Central Pacific case unless otherwise indicated.]

Argument.

I.

THE FEDERAL FRANCHISE OF PLAINTIFF IN ERROR WAS NOT INCLUDED IN THE ASSESSMENT.

(*Assignments of Error IV and X.*)

The Central Pacific Railroad Company of California, and the Western Pacific Railroad Company that consolidated, under the laws of California, into the Central Pacific Railroad Company (plaintiff in error), were incorporated under

the laws of California to construct and operate railroads within that State, from the Pacific Ocean at San Jose to the easterly boundary of the State, *before the passage* of any of the Acts of Congress granting Federal privileges or franchises to them, or to either of them. (Record, C. P. R. R. case, pp. 136–7–8, folios 280–1–2–3–4.)

The Acts of Congress referred to (12 *U. S. Stats*, 489; 13 *U. S. Stats.*, 356; 13 *U. S. Stats.*, 504) conferred upon these California corporations, subsequently consolidated into plaintiff in error, the right to construct and operate a railroad, as part of a continuous line from the Missouri River to the Pacific Ocean.

The Southern Pacific Railroad Company was first incorporated under the laws of California to construct and operate a railroad within that State, and subsequently succeeded to Federal franchises granted by Congress to the Atlantic and Pacific Railroad Company and to the Texas Pacific Railroad Company, to construct and operate a railroad from Springfield, Missouri, to the Pacific Coast (14 *U. S. Stats.*, 292; 16 *U. S. Stats.*, 573; 17 *U. S. Stats.*, 59). Record, S. P. R. R. case, pp. 117, 118, folios 239 to 243).

1. *The Federal franchise was not necessarily assessed as matter of law.*

Although the Acts of Congress above referred to did not undertake to provide, or in any manner indicate, that the State franchises of either of these companies should be exempt from State taxation, yet it is claimed by plaintiff in error that, as matter of law, the Federal franchise thus derived, became such an inseparable part of the State franchise, as to render illegal the assessment to plaintiff in error of anything under the designation " franchise."

In support of this position, counsel indulge in an argument which proceeds solely upon the theory that, if a railroad or other corporation which had been incorporated and organized under the laws of the State for the construction and operation of its properties and business, should thereafter obtain any privileges or franchises from the General Government, then such State franchise would, by

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In support of this position, counsel indulge in an argument which proceeds solely upon the theory that, if a railroad or other corporation which had been incorporated and organized under the laws of the State for the construction and operation of its properties and business, should thereafter obtain any privileges or franchises from the General Government, then such State franchise would, by

association with the Federal franchise, become so inoculated with the exemptions and privileges possessed by a Federal agency, as to be in effect merged in the Federal franchise, and not subject to taxation by the State, and that a State tax thereon would be a tax upon the operation of the railroad under its Federal franchise. The principle of this contention is not new, but has been urged in cases before this Court, to which we shall presently direct attention. In the first place the franchise derived by plaintiffs in error from California is property subject to taxation, and is just as much "property" for that purpose as the roadbed and rolling stock. It was said in *State Railroad Tax Cases*, 92 U. S., 603, "that the *franchise*, capital stock, business and profits of all corporations are liable to taxation in the place where they do business, and by the State which creates them, admits of no dispute at this day." The Constitution of California also declares that a franchise not exempt under the laws of the United States, is property to be taxed. (*Appendix to this brief*, p. 68.)

The State franchise being property subject to taxation by the State creating the corporation and conferring the franchise, can the grant of a franchise by the General Government divest the franchise derived from the State of its property character with reference to State taxation? It was not so decided in *California* vs. *Pacific R. R. Co.*, 127 U. S., 1. The decision in that case was based on a finding (*decision, p.* 35) that the assessment included the full value of *all franchises and corporate powers*, held and exercised by plaintiff in error. In that case, this Court held such finding by reason of its terms to include the Federal franchise and the assessment to be void by reason of such inclusive. There is nothing in that decision capable of being construed as holding that the State franchise could not be assessed. On the contrary, it is authority relied on by us that the State franchise can be lawfully taxed, for throughout that decision, the Court recognized the franchise derived by plaintiff in error from California, as being distinct from and independent of that granted by the

Federal Government. On page 38 of the decision the Court, speaking of the Federal franchise, says: "*This important grant, though in part collateral to, was independent of that made to the company by the State of California.*"

Nor does *San Benito Co.* vs. *S. P. R. R. Co.*, 77 Cal., 518, sustain such contention. That case arose out of the imposition, by the county, of a license tax upon the Southern Pacific Railroad Company, the effect of which was to prevent that corporation from doing any business at all, or in any manner to operate its railroad in the county, unless it obtained and paid for a license to do so. Its effect was to stop the company from operating under either its State or Federal franchise, and the only thing there decided by the Court was, that the corporation had, independently of its State franchise, a Federal franchise which entitled it to operate its road, as part of a system, through the County of San Benito, from a point in Missouri to the Pacific Ocean, and that there was no power in the county to impose a license tax upon its operation *under the Federal franchise*. The case of *S. F.* vs. *W. U. Tel. Co.*, 96 Cal., 140, is also clearly distinguishable from this case, because the Telegraph Company had no California franchise to be taxed and the State could tax neither its New York franchise nor its Federal franchise.

But, in the case at bar, the taxation by the State of the franchise granted by it does not, and could not in any event, prevent the operation by plaintiff in error of its railroad, under its Federal franchise. This is manifest, for even if the power to tax the State franchise involves the power to dispose of it at a delinquent tax sale or on execution, or to condemn it for public use, or to destroy it altogether; or even should it be voluntarily surrendered by the company to the State, yet plaintiff in error would still have its Federal franchise, which this Court has said is independent of the State franchise, and which is sufficient for the operation of the railroad in California. On the other hand, should plaintiff in error surrender, or in any manner be deprived of its Federal franchise, under

no principle of law could it be deprived of operating in California under its State franchise.

It must, therefore, be clear that the taxation, and even the destruction by the State of the State franchise held by this company, could in no degree limit or affect its exercise of a Federal franchise. This being so, we are within the principle announced by this Court in the following cases, which may be summarized as follows: The granting to, and acceptance by, a State corporation of a Federal franchise, does not exempt the corporation from State taxation upon its property, including the franchise derived from the State, which is property subject to taxation (92 U. S., 603), provided that the State cannot tax such Federal franchise, nor prevent the performance of Federal functions under such Federal franchise.

W. U. Tel Co. vs. *Mass.*, 125 U. S., 530.
R. R. Co. vs. *Peniston*, 18 Wall., 5–50.
Thomson vs. *Pacific R. R. Co.*, 9 Wall., 579.
Home Ins. Co. vs. *N. Y.*, 134 U. S., 606.
Hamilton Co. vs. *Mass.*, 6 Wall., 632.
Hare's Const. Law, 259.

In *Western Union Tel. Co.* vs. *Mass.*, 125 U. S., 530, the State of Massachusetts taxed the properties, and expressly taxed *eo nomine* the *franchise*, of the telegraph company in that State (p. 537); and the value of this franchise was based upon the earnings of the company from the use of its lines, and whether such lines were upon post-roads of the United States or not. The company set up that it was a corporation organized under the laws of New York, and that it operated in Massachusetts solely under the provisions of section 5263 of the revised statutes of the United States, granting it the right to operate its lines over all post-roads of the United States; and that the tax was one upon its operation under its Federal franchise, and not upon its property within the State. The tax was sustained in an able opinion by Mr. Justice Miller, in the course of which he said:

"It is urged that this section, upon its acceptance by this corporation, or any of like character, confers the right to do the business of telegraphing which is transacted over the lines so constructed over or along such post-roads, without liability to taxation by the State. The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited, cannot be taxed by the State; and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name they may be called, as described in the laws of Massachusetts it is essentially an excise upon the capital of the corporation. The laws of that commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of the government upon the amount and value of the capital so employed by it therein. While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless, the company receiving the benefit of the laws of the State for the protection of its property and its rights, is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

If this decision is read with the decison in *Hamilton Co.* vs. *Mass.*, 6 Wall., 632, it will be seen that an "excise tax" in Massachusetts includes a tax upon the franchise of a corporation, and is, in fact, a franchise tax, and that an "excise tax" in that State is thus held to be a franchise tax, because the Courts of that State have for a long period defined "commodities" to signify "convenience, *privilege*, profit and gains."

In *Railroad Company* vs. *Peniston*, 18 Wall., 5, the prop-

erty of the Union Pacific Railroad Company having been taxed by the State of Nebraska, it was claimed by the company that such property was exempt from State taxation, because it had been incorporated under an Act of Congress and was a Federal agent for the purposes specified in the Act of Incorporation. The Company also invoked in that case the decisions of this Court in *McCullough* vs. *State of Maryland*, and *Osborn* vs. *Bank of United States*, to the effect that the power of a State to tax a Federal agent involved the power to destroy such agent, and prevent its operation for the Federal purposes intended. This Court, however, in the *Peniston case*, distinguished those cases, showing that they applied and were intended to apply, only in case the State tax should operate so as *to prevent the performance* by the Federal corporation or agent of their operations on behalf of the General Government. In the case at bar, the railroad company has both a State and a Federal franchise for its operation in the State of California, and which franchises this Court has said were independent of each other (127 U. S., p. 38). How then can it be said that the taxation by the State of the State franchise would have the effect of destroying the operation of the railroad under the Federal franchise, which is excepted from taxation by section 1, article XIII of the State Constitution, and under which the railroad could be fully operated in California, even should the State franchise be destroyed?

In the United States Bank cases cited, the effect of the State tax was directly upon the operation of the bank under its Federal franchise—the only franchise it had—and hence, under the facts of this case, those cases do not apply here, further than as illustrating the application of constitutional law in an extreme case, and to the particular state of facts there existing. Moreover, the decisions of this Court, since its earlier decisions in the United States Bank cases, show a more liberal constitutional construction as between the General Government and the States, in the matter of State taxation of the property of

Federal agencies. This has doubtless been brought about by the extensive and necessary employment by the Government of both natural and artificial persons, to enable it to carry out its functions; and by a determination not to relieve such agencies, or their property, from their duties and liabilities to the States of which they may be citizens, or from which they may have, in the first instance, acquired corporate existence.

Such later decisions undoubtedly show the present rule of construction by this Court to be that the power of a State to tax the property of a Federal agent will not be denied should its exercise affect the operations of such agent in its Federal functions incidentally or in a remote degree. Such were the principles announced in *Railroad Company* vs. *Peniston* (p. 30), where it is said:

"It cannot be that a State tax, which remotely affects the efficient exercise of a Federal power, is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistant with the National Government. Neither may destroy the other. Hence, the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

In *Home Ins. Co.* vs. *New York*, 134 U. S., 594, a State tax upon the State franchise was claimed to be in effect a tax upon the capital stock, and illegal, because a portion of such stock was invested in United States bonds, the *franchise tax* being calculated on dividends earned by such investment. The Court held that the State had a right to tax the corporate franchise by any method it should see fit to adopt, and that such right is not affected by the character of the property in which such capital stock may be invested, and although the investment might be in United States bonds not subject to taxation.

Of all these cases, that of *Thomson* vs. *Pacific Railroad*, 9 Wall., 579, is perhaps most applicable, under the facts, to those now before the Court. There the *Eastern Division* of the Union Pacific Railway Company had been incorporated by the Territory of Kansas before the passage of the Acts of Congress of 1862 and 1864, which conferred upon that corporation practically the same privileges and Federal functions and obligations, including the right to construct railroads in national territory to connect with the Union Pacific (incorporated by Act of 1862), as was conferred by the same Acts on the Central Pacific Railroad Company, the California corporation.

The State of Kansas having subsequently taxed "the property" of this Kansas corporation, its stockholders sought to enjoin the collection of the tax, on the ground that State taxation of the property of such Federal agent would retard, impede and burden it in the discharge of its duties and obligations to the Federal Government (p. 584). The counsel of the Central Pacific Railroad Company was allowed to file a brief in the case, because of its "similar situation and circumstances in reference to like legislation" (pp. 586–7). In the course of its decision, the Court say:

"But we are not aware of any case in which the real estate, *or other property* of a corporation not organized under an Act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the Government.

It is true that some of the reasoning in the case of *McCulloch* vs. *Maryland* seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the Government of the United States.

And even in respect to corporations organized under the legislation of Congress, we have already held, at this term, that the implied limitation upon State taxation, de-

rived from the express permission to tax shares in the National banking associations, is to be so construed as not to embarrass the imposition or collection of State taxes to the extent of the permission fairly and liberally interpreted.

We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch* vs. *Maryland* beyond its terms. We cannot apply it to the case of a corporation deriving its existence from State law, exercising its franchise under the State law, and holding its property within State jurisdiction and under State protection." (p. 590.)

An inspection of the several Acts of Congress relied on by both of the plaintiffs in error in these cases, in connection with the Acts relied on by this Kansas corporation, will show that the former have and exercise no greater, but precisely similar, Federal privileges and franchises as were possessed and exercised by the latter corporation. The only apparent distinction between the case of *Thomson* vs. *Pacific Railroad* and the cases at bar is that, it does not appear in the Thomson case that any property was taxed under the express designation of "franchise." It does, however, there appear that "the property of the company" was taxed (p. 580); which expression includes all of its property. But since this Court there decided that the "real estate *or other property*" of the corporation was subject to State taxation (p. 590), and since a franchise derived from a State is, as we have seen, property subject to taxation, it seems clear that the above distinction between the cases does not really exist, but is fully disposed of by both the principle decided and the language used by this Court in that case.

In view of the controlling principle covered by these decisions, there is no ground for the contention that the State and Federal franchises are so blended that the State cannot, as a matter of law, tax the former. On this point, we also refer the Court to the decision of the Supreme Court of California, in this case (Record, pp. 266–267). Also reported in 105 Cal. Rep., p. 589. Concluding on this point, we direct attention to the somewhat inconsist-

ent position of the Central Pacific Railroad Company in this case to that assumed in the *Sinking Fund cases*, 99 U. S., 700, where it claimed to have derived no franchises from the United States, that all its operations were entirely under its charter from California, and that its relation to the United States under said Acts of Congress was solely that of *a contractor* employed by the Government to construct a portion of the railroad in consideration of the grants of land, rights of way and moneys given by said Acts.

2. *The State Court having found as matter of fact that the Federal franchise was not assessed* (Record, p. 142, folios 290–291), *this Court will not, upon writ of error in this action at law, review such decision of fact on the evidence.*

Downer vs. *Richards*, 151 U. S., 668.
Hall vs. *Campan*, 3 Wall., 106.
Baggs vs. *Mining Co.*, 3 Wall., 304.
Hall vs. *Jordan*, 15 Wall., 393.
Crary vs. *Devlin*, 23 Law. C. P. Co. Rep., 511.
Republican R. B. Co. vs. *Kansas*, 92 U. S., 317.
Israel vs. *Arthur*, 152 U. S., 355.
Hyde vs. *Booraem*, 16 Pet., 176.
U. S. vs. *King*, 7 How., 833.

In *Downer* vs. *Richards*, 151 U. S., at page 668, it is said:

"That this Court, in an action at law at least, has no jurisdiction to review the decision of the highest court of a State upon a pure question of fact, although a Federal question would or would not be presented, according to the way in which the question of fact was decided, is clearly settled by a series of later decisions."

3. *Should the finding of the State Court that the Federal franchise was not included, be reviewed in this Court, then we invoke the principle that the record judgment of the State Board of Equalization, fixing the assessment, could not be impeached by parol, except for fraud, and that no fraud is charged.*

The recorded judgment of the State Board of Equalization, making this assessment, was as follows (names and

amounts here omitted): "And it appearing that the actual value of the *franchise*, roadway, roadbed, rails and rolling stock of said company within this State is ..... dollars; therefore, it is hereby ordered that the said franchise, roadway, roadbed, rails and rolling stock for the year 1887, be and the same are hereby assessed to said ..... Railroad Company, at the sum of ..... dollars" (Record, p. 148, folio 304).

These terms of the assessment follow closely the provision of section 10, article XIII, of the State Constitution, that "the franchise, roadbed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value."

The word "franchise," used in section 10, Art. XIII of the Constitution and in the assessment, can be construed to mean and apply to *such franchise only as is derived from the State*, and assessable for purposes of taxation, for by section 1 of the same Art. XIII of the State Constitution, a franchise is property to be taxed, and the same section also expressly excepts from State taxation, property exempt under the laws of the United States; and which exemption, under the decisions of this Court, would embrace a franchise derived from the General Government. (Appendix pp. 68–9). Such was the language of the formal written record of the final judgment of the State Board making this assessment. This record of assessment, following the exact language of the State Constitution, in its description of the property and in the use of the term "franchise within the State," was not ambiguous, as was claimed by plaintiff in error in the State Court; but expressed upon its face, when considered with sections 1 and 10 of article XIII of the State Constitution, the fact that the only franchise thereby assessed to plaintiff in error, was the franchise derived from the State.

The plaintiff in error made no claim in the State Court, on the trial of this case, that the assessment was fraudulently made by the board, or by any member thereof; nor

was any such claim set up in its answer. In the absence of any such claim of fraud, we submit that the judgment of the board, fixing the assessment, could not be impeached by parol testimony, as was attempted in the trial Court.

Pittsburg, etc., Ry. Co. vs. *Backus*, 154 U. S., 421.
Phelan vs. *S. F.*, 6 Cal., 532.
People vs. *S. F. S. U.*, 31 *Id.*, 132.
S. F. G. L. Co. vs. *Dunn*, 62 *Id.*, 589.

In the late case of *Pittsburgh, etc., Ry. Co.* vs. *Backus*, cited, this Court held that parol testimony could not be received to impeach the certificate of the assessing board, except to "establish fraudulent conduct on the part of the board sufficient to vitiate its determination." That case being a suit in equity by the railroad company, the parol testimony appears to have been considered by this Court, and found insufficient to impeach the record of the assessment. The rule invoked by us here has especial application in this case, where the attempt to impeach the record of the assessment consisted in an endeavor, by plaintiff in error, to have one of the five members of the State Board of Equalization, as constituted in 1887, swear that he had individually taken into consideration the Federal franchise, in arriving at the assessment. If parol testimony of that kind is admissible, then all judgments, and records of determinations, by quasi-judicial boards or officers having a right to hear, determine and record their judgments on questions of fact, would be at the mercy of any member of such board who might be induced to go upon the witness stand, to nullify and stultify the record of his decision, by swearing that, in arriving at such decision, he had taken into consideration and included, but had not expressed in such decision a matter that he, under the law governing his office and duties, had no right to consider or include.

4. *The evidence introduced failed to impeach the record of these assessments, and the finding that the Federal franchise was not assessed is fully sustained by the evidence.*

Mr. L. C. Morehouse, who was a member of the State

Board of Equalization in 1887, when the assessment in question was made, was called as a witness by plaintiff in error, to impeach the record of the assessment. The testimony of this witness was most singular. In the first part of his examination, possibly sensible that he was called on to swear that he had, as a sworn public officer, made an illegal assessment, he testified that, in making the assessment, the board considered and included, in the language of the Constitution, the franchise, roadbed, right of way, "everything included in the language of the law." (Record, p. 180, folio 358.) This was clearly in the State's favor. The witness then appeared to assume courage, and testified in effect that the Federal franchise was included and considered in making the assessment for 1887, and excluded in 1888, *so far as he was concerned*, but that the other members of the board *might not have taken it into consideration* in arriving at the values. (Record, pp. 182–183, folios 361–363.)

This was clearly, at most, but the individual opinion and consideration of Mr. Morehouse, who was but one of the five members of the board; and his opinion did not in any manner appear as a part of the minutes of the board, relating to its acts in making the assessment for 1887, and did not in any degree explain or impeach the record of the assessment, nor prove that the board, in using the term "franchise within the State," had included a Federal franchise, or any franchise not assessable under the Constitution. The witness was further unable to say what valuation, if any, he had placed upon the Federal franchise. (Record, p. 188, folio 372.) He was even wholly ignorant of what the alleged Federal franchise consisted. (Record, p. 186, folio 368.)

On cross-examination, this witness collapsed entirely, and admitted that the language of the assessment of 1887, wherein the property of the plaintiff in error was described as "the franchise, roadway, roadbed, rails and rolling stock within this State," was so used therein for the purpose of following the language of the State Constitution;

and that, in fixing the value of the property represented by those words, *he intended to assess it in accordance with law* (Record, p. 189, folio 374).

It is thus apparent that the only witness, thus called upon to prove the illegality of his own official acts, broke completely down, and was forced to admit that the assessment in question followed the language of the Constitution, and was only intended to assess what could be legally assessed under the Constitution.

Plaintiff in error also introduced the minutes of the board relating to the assessment of railroad property for 1888, when the Attorney-General advised the board to make a special exception of any Federal franchise in the assessment for that year (Record, p. 163, folio 320); which exception was claimed to be a circumstance tending to show that the Federal franchise had been assessed in 1887; but which exception, as will be hereafter shown in Mr. Dunn's testimony, was made merely as matter of precaution, and which express exception was also in accordance with the verified statement of plaintiff in error (Ex. 4 of Deft. in error; Record, p. 165, folio 334), filed with the board for purposes of assessment for 1888. The testimony of Mr. Morehouse and the minutes relating to the assessment of 1888, were the only attempted proofs submitted by plaintiff in error in support of its contention that its Federal franchise had been included in the assessment for 1887.

IN REBUTTAL.

The State called Mr. Wilcoxson, a member of the Board in 1887, who testified that a Federal franchise was not included in the assessment for 1887 (Record, pp. 207–8–9, folios 407 to 414). Mr. John P. Dunn, the State Comptroller and also a member of the Board in 1887, testified that the Federal franchise was not assessed in 1887 (Record, p. 217, folio 428). That the only franchise assessed was that reported to the Board by plaintiff in error itself (Record, pp. 219–220, folios 431–432). That the assessment of 1888, expressly excluded any Federal franchise, merely

as matter of precaution, because the findings in a suit as to taxes of prior years showed that the Federal franchise had been assessed (Record, p. 218, folios 428–9).

Mr. Dunn testified positively and repeatedly that no Federal franchises were included in the assessments. Nor did he testify, as has been claimed by counsel, that the Board, in arriving at the valuation, considered solely the entire capital stock and bonds covering the road outside of this State, and also the earnings of the road without this State. He testified that those matters were taken into consideration only in comparison with the capital, bonds, and volume of business in this State, in an endeavor to arrive at a correct valuation of the properties within this State (Record, pp. 221–2–3, folios 435–6–7). But, as we have already seen, the assessment of the capital stock, or an assessment based upon the earnings of a corporation operating either partly or wholly under a Federal franchise, is not an assessment of the Federal franchise.

W. U. T. Co. vs. *Mass.*, 125 U. S., 530.
Home Ins. Co. vs. *N. Y.*, 134 *Id.*, 606.
Thomson vs. *Pac. R. R. Co.*, 9 Wall., 579.
Pittsburgh, C. C. and St. L. R. R. vs. *Backus*, 154 U. S., 421.

It is clear, considering all the testimony and evidence relied on by plaintiff in error to impeach the record of this assessment, that such attempt was a total failure. Even should it be held that the record of assessment could be attacked in any such manner, yet there was a substantial conflict in such evidence. There being such conflict in the evidence, the findings that this assessment did not include a Federal franchise, or fences, or steamboats, or anything that could not lawfully be included therein, was not disturbed by the Supreme Court in California, in accordance with its well-known rule of decision, forcibly expressed in *Butler* vs. *Reay*, 95 Cal., 214, as follows:

"It has been held in more than a hundred cases, commencing with *Payne* vs. *Jacobs*, 1 Cal., 39, in the first

published book of reports of this Court, and ending with *Dobinson* vs. *McDonald*, 92 Cal., 33, in the last volume of such reports, that the finding of a jury or a Court as to a fact decided upon the weight of evidence will not be reviewed by this Court."

Furthermore, the Supreme Court of California states, in its decision in this case (105 Cal., p. 591), that the finding of the lower State Court, as to the non-inclusion of a Federal franchise in this assessment, is "fully supported by the evidence."

5. *The assessment of the franchise and the description of the same in the assessment, followed and was identical with the Railroad Company's descriptions thereof, contained in its verified statements, made to the assessing board, for purposes of assessment. Plaintiff in error is bound by those descriptions, and if the words "franchise within the State" were ambiguous, and included a Federal franchise, such ambiguity arose from the acts of the plaintiff in error in furnishing the descriptions of its property, and hence it is estopped from denying the correctness of such descriptions, or the correctness of the assessment following the same.*

Against the evidence introduced by plaintiff in error, in its endeavor to show that the assessment of its "franchise within the State" was ambiguous, and included a Federal franchise, the State introduced in rebuttal the verified statement made by plaintiff in error to the State Board of Equalization, under the provisions of section 3664 of the Political Code of California (Appendix, p. 70), containing a description of its properties assessable by said State Board for the year 1887. This verified statement was in the same form as to each of these railroads and was as follows: (Names and amounts here omitted.)

"To the State Board of Equalization, Sacramento City:

"The Railroad Company answers the questions propounded by the board as follows, and makes the following statement in relation to its property *subject to taxation in the State of California*, owned by it for the year ending on the first Monday in March, 1887, and of all property used in operating its railways during such year.

"The length of railway owned and operated as a system in and out of the State is.....miles.

"Length of track (see note page.....), and double track....., reduced to a single track, is.....; out of the State.....miles; in the State..... miles.

"The value of the *franchise* and entire roadway, roadbed and rails *within this State* is....." Record, p. 173, folio 345–6, Plff's Exhibit 6.)

Now, the assessment in each of these cases complained of as being ambiguous in the use of the words "franchise within the State," and which words, it is claimed, also included a Federal franchise, follows the language and description given by plaintiff in error in its above verified statement, as follows: (Names and amounts here omitted.)

"And it appearing that the actual value of the *franchise*, roadway, roadbed, and rolling stock of said company *within this State*, at the said date and time in March, was and still is the sum of $..... Therefore, it is hereby ordered that the said *franchise*, roadway, roadbed, rails and rolling stock for the year 1887 be and the same are hereby assessed to the said.....Pacific Railroad Company at the sum of $....." (Record, p. 148, folio 304.)

The foregoing recitals from the verified description by plaintiff in error of its properties, and from the assessment based thereon, contain the only attempted identification or description of the franchise submitted to and assessed by the Board of Equalization. As this assessment purports to describe the same franchise submitted by plaintiff in error as subject to legal assessment, what possible ground has plaintiff in error for claiming that such assessment includes a Federal franchise not subject to legal assessment? It is settled law in California *that a party is bound by, and will not be heard to complain of, an assessment for purposes of taxation, which follows the description furnished the assessor by the party himself*. This rule is elementary, and founded on the doctrine of estoppel. The following are decisions of the Supreme Court of California fully sustaining the rule:

People vs. *S. and C. R. R. Co.*, 49 Cal., 420.
City and Co. of S. F. vs. *Flood*, 64 *Id.*, 504.
Lake Co. vs. *Mining Co.*, 68 *Id.*, 14.
Dear vs. *Varnum*, 80 *Id.*, 87.

Since plaintiff in error is estopped, by reason of its verified description of its franchise, from showing that the assessment, following such description, was ambiguous or invalid, the testimony introduced to impeach such assessment, and the rulings of the Court as to its admission or rejection become immaterial.

While we think this question fully and finally disposed of by the verified statement made by plaintiff in error in 1887, yet, in the same connection, we think it proper to direct attention to the verified statement made by it to the assessing board, for purposes of taxation in 1888, which was introduced by the State in rebuttal to overcome the testimony introduced by plaintiff in error, that its assessment for 1888 was expressly made so as to include only its franchise derived from the State, and from which, it was urged that the form of assessment in 1888 was a circumstance and implication, that the Federal franchise had been assessed in 1887. Accordingly, in addition to the testimony of Mr. Dunn, a member of the Board of Equalization, that the form of the assessments for 1888, was adopted as matter of precaution, upon advice of the Attorney-General (Record, p. 218, folio 428), the State introduced said verified statement, made by plaintiff in error to the assessing board for 1888, from which it appeared that plaintiff in error, of its own accord, changed its description of its franchise, describing it in its said statement for 1888, as "the franchise derived from the State within the State." (Record, p. 165, folio 334, Plff's Exhibit 4.)

Accordingly, if the introduction of the testimony and record and minutes of assessments for 1888, together with the verified statement for that year, shows anything, it is, that plaintiff in error recognized that any ambiguity or

doubt, as to whether or not its Federal franchise had been assessed in 1887, arose from its own method of describing its franchise, in its statement to the assessing board for 1887.

6. *The lower Court did not err in admitting these statements in evidence in rebuttal.*

(Assignments of Error XIX–XX.)

It is claimed that the statements above referred to, were improperly admitted in evidence. As plaintiff in error had been permitted to introduce parol and other evidence in support of its contention that the assessment was ambiguous, and included a Federal franchise, it was certainly proper to permit the State to produce these verified statements in rebuttal, to show that the alleged ambiguity, if any, arose from the verified statements plaintiff in error had itself furnished the assessing board for those years. We do not think counsel's argument on this point deserving of serious consideration. They said in the State Court, and will doubtless repeat it here, that plaintiff in error should not be estopped or bound by these statements, because they were on printed blanks prepared by the board to be filled out by plaintiff in error, "and that plaintiff in error had nothing to do with the language used." The railroad company thoroughly understood that the printed blank, when filled out and sworn to, constituted the verified statement that section 3664, of the Political Code of California, required to be made by it each year to the State Board of Equalization, for purposes of taxation (Appendix, p. 70). It strikes us as absurd to ask any Court to believe that plaintiff in error was so inexperienced and unmindful of its interests as to fill out and swear to statements of its property in the language thereof "*as being subject to taxation,*" on blanks furnished for that purpose, without realizing the purport of the statement when completed and sworn to, and without correcting such blank forms, if necessary, to make them conform to the facts.

The blank forms called on plaintiff in error to give a

statement of the value of its franchise within the State, *for purposes of assessment and taxation;* and had plaintiff in error then intended to claim that its State and Federal franchises were so merged as to render the former not subject to taxation, and that it had no franchise subject to assessment, it would undoubtedly have so indicated in its statements. It must be apparent that, when plaintiff in error made its statement for 1887, it meant to include and did include its franchise derived from the State, and that they did not intend to include or refer to any franchises, Federal or otherwise, that were not legally subject to assessment.

7. *Plaintiff in error waived all rights to contest the assessment, and cannot be heard in this action to complain of it on any ground; since, if such assessment was for any reason invalid, plaintiff in error had a complete remedy of appeal and for correction under section 3665 of the Political Code of California, of which it failed to avail itself.*

It is provided by section 3665 of the Political Code that "if the owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by the Board, such owner may, at the meeting of the Board under the provision of section 3962 of the Political Code, between the third Monday in August and the third Monday in September, apply to the Board to have the same corrected in *any particular.*" (Appendix, p. 74.) It does not appear that plaintiff in error availed itself of this provision, under which it could have had the assessment corrected "*in any particular,*" which would include the right to have the value of the Federal franchise eliminated, had it been in fact included. This provision was designed for the benefit both of plaintiff in error and of the State, with a view of fully and fairly settling, as between both parties, all questions that might be urged against the assessment, and before the levy of the taxes. Plaintiff in error has not shown that it made an ineffectual or any application to the Board of Equalization, for correction of its assessment under this section (3665). Not having

availed itself of this remedy, given for the express purpose of correcting its assessment *in any particular* in which it might have been erroneous, plaintiff in error is in this action precluded from asserting that the assessment is erroneous.

People vs. *Arguello*, 37 Cal., 524.
People vs. *Whyler*, 41 *Id.*, 351.
San Jose G. Co. vs. *January*, 57 *Id.*, 615.
Ballerino vs. *Mason*, 83 *Id.*, 449.
Mix vs. *People*, 116 Ill., 265.
People vs. *Wall St. Bk.*, 46 N. Y., 525.
People vs. *Com'rs of Taxes*, 99 N. Y., 254.
New Orleans vs. *C. and B. Co.*, 32 La. Ann., 157.
N. P. R. R. vs. *Patterson*, 10 Mont., 90.
Bratton vs. *Town of Johnson*, 76 Wis., 430.
Norcross vs. *Milford*, 150 Mass., 237.
Jones vs. *Rushville* (Ind.), 35 N. E. R., 390.
P. I. Co. vs. *Crystal Falls*, 60 Mich., 510.
Rio Grande R. R. Co. vs. *Scanlon*, 44 Tex., 649.

It appears, from an examination of the cases supporting this principle, that the remedy for correcting an erroneous assessment is exclusive, as to all errors and matters which the Board of Equalization, or other board of correction, is given authority to correct and regulate, except in cases of fraud committed by the assessing board or officer. In this case, there is no pretense that the Board of Equalization acted fraudulently.

8. *Plaintiff in error had a still further remedy given by section 3669 of the Political Code of California, in which all questions relating to any alleged illegality, either in the assessment or as to the tax, could have been settled, and of which remedy it failed to avail itself.*

It is provided by section 3669 of the Political Code of California that, if plaintiff in error should claim either that the taxes, or its assessment, were illegal, then in such case, the taxes must first be paid to the State Treasurer, whereupon plaintiff in error is authorized, after notifying

the Comptroller that it intends to begin action, to institute an action against the State Treasurer for the recovery of the taxes or any part thereof so paid, and in the complaint "may allege any fact tending to show the illegality of the tax, *or of the assessment upon which the taxes are levied in whole or in part.*" This section further provides that the taxes so illegally collected and costs may be recovered in such action, and that unless action be begun on or before the first Monday in February of the year succeeding the year in which the taxes are levied, *such failure shall be deemed a waiver of the rights of action.* (Appendix, pp. 77–8.) As plaintiff in error has not paid its taxes for 1887, it could not bring the action under said section, and having failed to make such payment and institute such action, it has, under the express provisions of the statute, waived the right to set up in this action all questions affecting the "legality of the tax or of the assessment upon which the taxes are levied in whole or in part." The principle embodied in section 3669 of the Political Code of California has been fully sustained in *Los Angeles* vs. *Ballerino*, 99 Cal., 596.

II.

THE ASSESSMENT AND THE MORTGAGES.

(*Assignments of Error III, XI.*)

1. *The question as to whether or not section 4, article XIII of the Constitution of California, relating to the assessment of mortgaged property, deprived plaintiff in error of any rights secured to it by the XIV Amendment to the Constitution of the United States, was neither raised by nor decided against plaintiff in error in the Supreme Court of California, but, under the rule of decision in that Court, was waived and abandoned, and hence there is no decision of that Court on the matter raising any Federal question, subject to review by this Court on writ of error.*

It is settled that, in order to give this Court jurisdiction of a writ of error to review a judgment of the highest Court of a State on the ground that it has decided against

a title, right, privilege, or immunity claimed under the Constitution of the United States, such title, right, privilege, or immunity must have been "specially set up or claimed in the proper time and in the proper way," in the highest State Court, and that the decision of such highest State Court *must have been against such right or immunity.* In these cases, although plaintiff in error had set up in its answer in the trial State Court, its alleged right, under the XIV Amendment, to have these mortgages deducted from the assessments, *yet it did not present such question, nor make any such claim, before the Supreme Court of California;* and that Court, as may be seen from its opinion in this Record (page 262), never passed upon the question, and it has not decided against the rights and immunities claimed by plaintiff in error under the XIV Amendment, relative to these mortgages.

As was said by this Court in *Maxwell* vs. *Newbold*, 18 How., 515: "It must appear on the face of the Record that it was in fact raised, that the judicial mind of the Court was exercised upon it, and the decision against the right claimed under it." (See also *Leeper* vs. *Texas*, 139 U. S., 462; *Duncan* vs. *Missouri*, 152 U. S., 377; *Morrison* vs. *Watson*, 154 U. S., 115; *Seyward* vs. *Denny*, 158 U. S., 180.) Not only was the Federal question as to the mortgages not presented to, nor passed upon, by the Supreme Court of the State, but, under a well settled rule of practice of the Supreme Court of California, the question was *waived and abandoned* by the railroad companies *in that Court* by their failure to present it to that Court for decision by oral or printed argument. In *Tuller* vs. *Arnold*, 68 Cal., 522, it was held that, where the transcript discloses a subject-matter of appeal, of which no mention is made in the briefs of counsel, it will be assumed by the appellate Court that the questions involved have been abandoned. (See also *Webber* vs. *Clarke*, 74 Cal., 11; *West* vs. *Crawford*, 80 Cal., 19; *Wheelock* vs. *Godfrey*, 100 Cal., 578.)

This being the settled rule in California, it appears that the alleged Federal question was not presented to the Su-

preme Court for decision "in the proper mode and at the proper time," as required by the rule of decision of the Supreme Court of California. The briefs of counsel in the State Court are, of course, no part of this record; but the opinion of the State Supreme Court is in the record, and the absence of any decision therein on the question, certainly raises the legal presumption in favor of the State Supreme Court, that the question was not presented to it for decision; but that it was waived and abandoned, under the well settled rule of practice obtaining in that Court. The burden of proof being on plaintiff in error to satisfy this Court that such Federal question was both raised in and decided by the Supreme Court of California we submit that the Record containing the decision of that Court fails to show any decision on such question.

Should the fact as to the non-presentation through argument of this alleged Federal question to the State Supreme Court be disputed, it can be proven to this Court by production of the arguments of counsel, both oral and printed (copies of which we have), and also by other proof if required, that the fact is as stated by us. Under the above-stated rule of decision of the Supreme Court of California, it cannot be claimed in this Court that a decision against plaintiff in error on this mortgage question was necessarily involved and disposed of by the mere affirmance of the decision of the trial Court by the Supreme Court of the State, because it is evident that, *under such rule of decision*, the affirmance of the decision of the trial Court on points argued in the Supreme Court was because such points were properly decided by the trial Court, while the affirmance carrying with it points not argued, was based solely on the ground that they were *waived and abandoned* by appellants in the Supreme Court of the State for all purposes of the case.

2. *From the nature and provisions of the mortgages themselves, the one held by the Government of the United States could not be deducted; while the other mortgage, executed before the adoption of the State Constitution, expressly provided that*

plaintiff in error should pay all taxes. Hence, plaintiff in error could not be deprived of any rights under the XIV Amendment, by reason of the non-deduction of the mortgages from the assessment.

The first mortgage set up by plaintiff in error in the Central Pacific case, is the one belonging to the United States under the Acts of Congress of July 1, 1862, and July 2, 1864, under which the United States, *prior to the adoption of the State Constitution in 1879*, issued bonds on the railroad within California, at the rate of $16,000.00 a mile (Record, p. 139, folio 285). As this mortgage was owned by the United States, and was *exempt from State taxation under the provisions of section 1, article XIII, of the State Constitution*, it could not, by any process of reasoning or construction, be held to be *an interest in property for purposes of taxation or deduction*, under the provisions of section 4 of the same article of that Constitution; and this is so, even should we eliminate from section 4 the exception as to railroad property, complained of by plaintiff in error.

Under section 1 of the State Constitution, all the property of the railroad in the State must be taxed; but under the same section, a secured debt thereon, belonging to the United States, cannot be taxed. By section 4, a secured debt is made an interest in the property for purposes of taxation only, and is taxed to the holder of the debt. Such tax on the secured debt is also made, by section 4, a lien on both the property *and the security*. Now, as this secured debt, belonging to the United States, is not taxable, and cannot be subjected to *any lien* for taxes, it must be clear that it cannot, under section 4, be considered either as an interest in the property, for purposes of taxation, or as capable of being deducted; since, to entitle it to be deemed such interest, and to be deducted, it must be subject to taxation, and to a lien therefor.

It thus appears that the conditions required by section 4 fail to reach this case, so as to authorize a deduction in the railroad's favor, on account of this Government mort-

gage, and that this would be so even should we consider the exception as to railroads entirely eliminated from section 4. It is furthermore evident that, if such deduction of this security was made, the State would lose entirely the tax on the value of the property, to the extent of $16,000.00 a mile, since the Government mortgage interest could not be taxed.

As a final statement of the proposition, we say that a deduction of a secured debt under section 4, read in connection with section 1, was intended to take place, and can only take place in cases where the security is capable of being taxed to the owner thereof, and subject to a lien for the tax thereon.

THE OTHER MORTGAGE found by the Court to be a lien on the railroad of the Central Pacific Railroad Company, was that issued under the provisions of the Act of Congress of July 2, 1864, to an amount of $5000 per mile. (Record, p. 139, folios 285–6–7.) This mortgage was executed July 25, 1865, *before the adoption* of the State Constitution in 1879, and contained the *express covenant on the part of the Railroad Company, mortgagor, to pay all the ordinary and extraordinary taxes, assessments and other public burdens and charges,* which should or might be imposed upon the property thereby mortgaged. (Record, p. 140, folio 286.) The burden of paying all the taxes upon the entire value of the mortgaged property was, therefore, by contract of the parties, laid upon the Railroad Company; and the obligation of this contract could not be impaired by the subsequent adoption, in 1879, of the provisions of section 4 of article XIII of the State Constitution, charging the tax on the land, to the extent of the mortgage interest therein, to the mortgagee.

That such prior covenant as to payment of taxes by the mortgagor could not be impaired by the subsequent adoption of said constitutional provision, was *expressly decided* by the Supreme Court of California, in *Beckman* vs. *Skaggs*, 59 Cal., 543, in which case the mortgage, like the one in question, was made prior to the adoption of the State Con-

stitution, and also contained a covenant that the mortgagor was to pay all the taxes on the land. The mortgagee having paid taxes on the land which the mortgagor had failed to pay, the former sought to recover such payments on foreclosure. The trial Court having refused in that case to award the mortgagee the taxes so paid, the Supreme Court of California reversed such ruling in the following language:

"In the year 1880 the mortgage, *for the purposes of taxation, was an interest in the land, the tax upon which defendent had agreed to pay.* (Const., Art. XIII, Sec. 4.) The covenant was that defendant should pay the tax upon the full value of the land. Under the present Constitution he is assessed only for the value of the land, less the amount of the mortgage debt. The agreement to pay the whole tax was valid when made, and so to construe the provision of the Constitution as that the agreement may not be enforced according to its terms would be to impair the obligation of the contract. (Const. U. S., Art. I, Sec. 10.)

Section 5 of article XIII of the present State Constitution applies to contracts made *after* its adoption."

It is furthermore apparent that section 4 of article XIII was never intended to apply to the case of a mortgage *made prior* to the adoption of the Constitution, and providing for the payment of all taxes on the land by the mortgagor, because it is provided by section 5 of the same article that, only those mortgages shall be void, on account of requiring the debtor to pay the tax thereon, as shall be made *after* the adoption of the Constitution. (Appendix, p. 69.)

Any impairment of the contract between mortgagor and mortgagee by subsequent legislation relating to taxes upon foreign held bonds secured by mortgage, as is the case here. (Record, p. 140, folio 287), is especially prohibited by this Court in *State Tax on Foreign held bonds*, 15 Wall., 300.

Consequently it appears that, even if said section 4 did not contain the exception, prohibiting the deduction of mortgages on railroad property; yet, in this case, the Cen-

tral Pacific Railroad Company, as mortgagor, would in any event be bound to pay the tax on this mortgage. A failure, therefore, to deduct the mortgage and assess the tax thereon to the holders of the mortgage bonds, on the theory that the mortgage is an interest in the land for purposes of taxation, cannot result in depriving the Railroad Company of the equal protection of the laws, or of any right or immunity secured to it, within the intent of the XIV Amendment, nor result in any injury to it, since by the express terms of its contract, made before the adoption of such method of assessment by the State, it could not claim any immunity from the payment of all taxes upon the entire value of the mortgaged property, without any deduction of the value of the mortgage interest therein.

This becomes especially evident when we consider that the purpose and effect of taxing mortgaged property, not within the exception, under section 4, article XIII, of the State Constitution, was to relieve the owner of the property from the tax on so much of its value as equalled the amount of the mortgage thereon. But as these companies had already covenanted to pay all the taxes on the mortgaged property, how could it be possible for such constitutional provision to relieve them of such contract, without impairing the obligation thereof?

We consider the principle here invoked to have been authoritatively settled by this Court in *Supervisors* vs. *Stanley*, 105 U. S., 305. In that case it was sought to have a statute of New York declared void, on the ground that under it the owner of National Bank shares was not permitted to make deduction of the amount of his debts from the valuation of such shares, for purpose of taxation; and which deduction this Court, in a number of cases, has held should be made under the Act of Congress, permitting State taxation of such shares under certain limitations. As to all the shareholders except one, it did not, however, appear that they had any debts capable of being deducted (p. 308). Under such a state of facts, the Court decided

that the question as to the validity of the State statute did not arise, as to the shareholders who had no debts to deduct, because they could not be injured or deprived of any substantial right, by reason of such non-deduction. At page 311 the Court say: "Why should he invoke the protection of the Act of Congress in a case where he has no rights to protect? Is a court to sit and decide abstract questions of law, in which the parties before it show no interest, and which, if decided either way, affect no right of theirs?"

THE SO-CALLED LAND MORTGAGE.

Attached to the answer of the Central Pacific Railroad Company was an alleged mortgage of its land grants, but which was not offered in evidence, or in any manner relied on by that company, on the trial of its case. It could not, under any circumstances, have any bearing on the case, for the reason that the property covered thereby, consisted solely of certain lands granted by the United States to that company, none of which lands were included in the assessment in this case, made as we have seen solely upon the franchise, roadway, roadbed, rails, and rolling-stock. This mortgage even expressly excepted so much of the granted lands as might constitute the right of way of the railroad (Record, p. 124, folio 255). Furthermore, the assessment of such granted lands is solely within the jurisdiction of the several county assessors, and not within the powers of the State Board of Equalization, making the assessment sued on in this case (Appendix, p. 72); so that, if any deduction should have been made by reason of this land mortgage, application therefor could not be made to said State Board, that did not assess, in this case, any of the lands covered thereby. And finally, no taxes on said lands are sought to be recovered in these cases.

IN THE CASE OF THE SOUTHERN PACIFIC RAILROAD COMPANY, the only mortgage is one executed April, 1875, *before the adoption* of the State Constitution, which contained the express agreement on the part of that company with the mortgagees, to pay all taxes imposed on

the property mortgaged, which included the railroad (Record, S. P. case, p. 119, folio 243). This mortgage, containing the same provision in regard to the payment of taxes, as did one of the mortgages of the Central Pacific before mentioned, our argument in that case applies here, to the effect that the failure to deduct the value of the mortgage, from the assessed value of the railroad covered thereby, could not impose upon the railroad company any burdens in violation of the XIV Amendment, or any burden which the railroad company had not by contract assumed.

3. *Assuming that these mortgages should have been deducted, yet plaintiff in error is not in a position to complain of their non-deduction, because it neither reported them to the assessing board, nor asked to have the assessments corrected in that respect, under the statutes of California providing for correction of such assessments.*

When plaintiff in error made to the State Board of Equalization its verified statement of its property as being property *subject to taxation* (Record, p. 173, folio 346), it neither referred to these mortgages, nor asked to have them deducted. Indeed, after the assessment was made, plaintiff in error had full opportunity, under sections 3365 and 3369 of the Political Code of the State (Appendix, pp. 74–7), to apply for such deduction, both to the assessing board and to the Court. But since it appears that no such relief was demanded under these remedial statutes expressly provided to correct all errors in the assessment of railroads, plaintiff in error is estopped from setting up in these cases such non-deduction of the mortgages (See points and authorities heretofore given in this brief, under subdivisions 7 and 8 of Point I). We also especially refer to *Supervisors* vs. *Stanley*, 105 U. S.; 305, which is decisive on the point that taxpayers are estopped from complaining of non-deductions when no claim for such deduction is made to the assessing board.

4. *Section 4, article XIII of the Constitution of California, relating to the assessment of mortgaged property, does not deprive plaintiff in error of any rights secured to it, by*

the XIV Amendment to the Constitution of the United States, but the classification of railroads and other quasi public corporations for such purpose, is fully justified by the special conditions under which the properties of such corporations are used.

Section 4, article XIII of the Constitution of California, adopted in 1879, is as follows:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby, except as to railroad and other quasi-public corporations. In case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof; provided, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year." (Appendix, p. 68.)

Plaintiff in error contends that this constitutional provision of the State conflicts with the XIV Amendment to the Constitution of the United States, in providing that its property should be assessed to it, for purposes of taxation, without deducting from the assessment the value of the secured indebtedness thereon, as is done in the case of property owned by others, who are not railroads or other quasi-public corporations; and that such difference in method of assessment is a discrimation based on ownership, not permissible under the XIV Amendment. Such

is not the ground of the distinction. The secured debts of railroad and other quasi-public corporations in California, and particularly those of plaintiff in error set up in this record, were not held in that State at the time of the adoption of the Constitution, nor are they now held so as to be available for taxation, under the same conditions as debts secured by the property of other classes in the State. The constitutional provision was not intended to relieve any property from taxation, but was an attempt to relieve the debtor from taxation on mortgaged property, to the extent of the debt, and to compel the creditor to pay the tax on the mortgaged property, to the extent of the mortgage thereon.

It is obvious that this could not be accomplished in cases where, as in the case of plaintiff in error, its secured indebtedness was represented by mortgage bonds, owned for the most part by persons residing outside of the State of California (Record, p. 140, folio 287), who could not be taxed (*State tax on foreign held bonds*, 15 Wall., 300), and that such deduction if extended to railroads, water companies and other corporations, exercising valuable public uses, and usually bonded for in excess of actual values, would practically result in the escape of all such corporations from taxation. That such was, at least, one of the considerations moving the convention framing the State Constitution, to make the classification complained of, appears from the debates of that body, an extract of which will be found in the Appendix to this brief at page 69.

But, in addition to the foregoing, railroad and other quasi-public corporations, by their ownership and exercise of public uses and functions, in relation to transportation and other matters, and by their possession, under the laws of California, of ~~the~~ rights and privileges not possessed by others, *did not hold or operate their properties and public uses in the same manner, or under the same conditions, as the property of others was held and used.*

It has been said that a corporation is but an aggregation of individuals, and that, therefore, its property is but the aggregate property of the individuals composing it. It has also been contended, that it follows from this (most narrow) definition, that the property of these railroad corporations should be taxed and dealt with by the State, exactly as is done with the properties of individuals and of corporations not exercising public uses. But it must be obvious that such contention wholly eliminates from consideration the great public use in which the property of a railroad company is employed, under franchises and attributes that place it far above and beyond all classes of individuals, or of private corporations, in its relations to the public and to the State.

It is not true that the property of quasi-public corporations such as railroad companies, water companies, and the like, are held or used in their relations to the State and to the public like that of an individual. While the State may undoubtedly itself exercise the great public use of transportation, it has seen fit to delegate the performance of such use to creatures of its own creation. For purposes of such use, a railroad company is, by the State, endowed with many sovereign attributes and privileges not permitted to individuals or to corporations of a purely private nature. The State has granted to railroad corporations the right to construct its roads across, along, and upon streams, bays, canals and flumes; the right to construct its roads over State lands, and to take and occupy on such lands all the ground necessary for depots, stations, and other buildings; the right of eminent domain in the condemnation of private property for its rights of way and other uses; and has given to cities and counties the right to grant to railroads large subsidies of money. With such powers and privileges not accorded individuals or to corporations not exercising such valuable public uses, railroad corporations can and do so use their properties and franchises as to control, in a large degree, the agriculture, manufactures, and commerce of the State, and so as to be,

in a great measure, the arbiter of its prosperity and destiny.

Mr. Justice Miller, in the *State Railroad Tax Cases*, 92 U. S., 606, stated as one of the reasons authorizing the classification of railroads for taxation that, "it is because, in the case of the railroad, there is attached to all its property, and goes with it a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit well adapted to make money by its use in that way, with chartered right to use it for that purpose."

This language has special application in these cases, from the historical fact that these railroad companies had and controlled, at the time of the adoption of the State Constitution, and still practically have and control, a monopoly of the great public use of transportation by rail throughout by far the greater portion of California, and also of railroad transportation to and from the State, except lately as to the southern part thereof.

From these considerations it must be evident that the discrimination complained of was neither adopted in the State Constitution nor enforced by the State of California, solely because of the ownership of the property, or with intent to oppress, but because property owned and mortgaged in the above manner indicated, by railroad and other quasi-public corporations, *was neither used nor mortgaged in the same manner, nor under the same conditions*, as the property of others.

It is now thoroughly settled by decisions of this Court that a State has a sovereign right, unassailable as being in conflict with the XIV Amendment, to thus classify property for purposes of taxation, according to the varying conditions and incidents relating to its kind, use or ownership, considered with reference to taxation, and that such classification does not violate the principle of uni-

formity of taxation, but is in fact and in law required to bring about such uniformity as nearly as may be.

In *Pacific Express Company* vs. *Siebert*, 142 U. S., 339, the discrimination complained of was under a statute of Missouri, which taxed persons or corporations transporting property to, through, or in the State, under contract with any railroad or steamboat company, but which tax did not apply to persons or corporations owning their conveyances for transportation. It was urged in that case, as here, that such discrimination was in violation of the Fourteenth Amendment, because a discrimination, solely by *reason of the ownership* of the business taxed, under an artificial legislative definition of express companies, which excluded other persons and corporations engaged in the express business in that State. (See argument in that case, p. 347.)

This Court, in disposing of the question, said:

"The second and third propositions stated above are reducible to the single contention, that the Act in question violates the requirements of uniformity and equality of taxation prescribed by the Constitution of Missouri, and thereby denies to the complainant the equal protection of the laws of the State which the Fourteenth Amendment to the Constitution guarantees shall not be abridged by State action.

This Court had repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected, either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens.

The rules of taxation in this respect were well settled in the opinion of the Court, delivered by Mr. Justice Bradley, in *Bell Gap Railroad* vs. *Pennsylvania*, 134 U. S., 232, 237, as follows: 'The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not tended to prevent a State from adjusting its system of tax-

ation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for the payment of money; *it may allow deductions for indebtedness, or not allow them.* * * * It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt.'

The contention of the complainant, however, in this connection is, that the rule of uniformity and equality of taxation is destroyed by the arbitrary discrimination involved in the definition of what shall be taxed under the Act, imposing upon certain persons or associations taxes from which other persons or companies of precisely the same kind, doing exactly the same kind of business, under exactly the same conditions, are exempt. In other words the contention is, that the Act of the Legislature arbitrarily defines what shall constitute an express company, and then lays a tax upon its business, while at the same time it permits the same kind of business to be done by any person or company not embraced within the class thus defined, without being subject to any tax at all. It is said that the Act, by the very terms of its definition, restricts the tax to persons or corporations who carry on the business of transportation *on contracts for hire with railroad or steamboat companies* doing business within the State; and that it permits any person or company that may be so for-

tunate as to own its own means of transportation to go free from any such tax. That is to say, an express company that engages for hire a railroad or steamboat company to transport its merchandise must pay a tax for the privilege of doing business, while the railroad or steamboat company owning its own means of transportation might, in connection with the business for which it was primarily chartered, engage in the express business without paying any tax whatever on the privilege of carrying on such express business. It is strenuously argued, therefore, that this is an unjust discrimination against the express companies defined by the Act, and in favor of other companies or persons that may, in connection with their primary or original business, engage in the express business, or that may carry on a separate express business, owning their own means of transportation.

The fallacy of this argument lies in the assumption that the definition of what shall constitute an express company excludes from the classification, companies which are as much engaged in the business, or as much under the same conditions as are those which, under the definition, are subject to the tax.

They do not do business under the same conditions, or under similar circumstances. In the nature of things and irrespective of the definitive legislation in question, they belong to different classes. There can be no objection, therefore, to the discrimination made as between express companies defined by this Act and other companies or persons incidentally doing a similar business by different means and methods, in the manner in which they are taxed. Their different nature, character and means of doing business justify the discrimination in this respect which the Legislature has seen fit to impose. The legislation in question does not discriminate between companies brought within the class defined in the first section; and such companies being so entirely dissimilar, in vital respects, as regards the purposes and policy of taxation, from railroad companies and the like, owning a large amount of tangible and other property subject to taxation under other and different laws, and upon other and different principles, we do not see how, under the principles of the many decisions of this Court upon the subject, it can be held violative either of the Fourteenth Amendment of the Constitution of the United States, or of the provision in the Constitution of Missouri, relating to equality and uniform-

ity of taxation. See *Barbier* vs. *Connolly*, 113 U. S., 27; *Soon Hing* vs. *Crowley*, 113 U. S., 703; *Dent* vs. *West Virginia*, 129 U. S., 114; *Missouri Pacific Railway* vs. *Humes*, 115 U. S., 512; *St. Louis* vs. *Weber*, 44 Missouri, 547; *Germania Life Ins. Co.* vs. *Commonwealth*, 85 Penn. St., 513; *Missouri* vs. *Welton*, 55 Missouri, 288."

Bells Gap R'd Co. vs. *Penn.*, 134 U. S., 232, cited in the foregoing decision, arose out of the alleged discrimination by a statute of Pennsylvania, which taxed moneyed securities at their *actual value*, except securities issued by corporations, which were taxed at their *nominal or par value*. The alleged discrimination complained of by plaintiff in error in the case at bar is certainly no greater than that presented under this statute of Pennsylvania; and the corporation, in the Pennsylvania case, had fully as good grounds as the railroad company here can have, for claiming the discrimination to have been made solely by reason of the character of the person issuing the security. The discriminating provisions in both cases are identical in principle.

In *Home Ins. Co.* vs. *New York*, 134 U. S., p. 606, the same principle was ably sustained by Mr. Justice Field, delivering the opinion of the Court, in which he says:

"Nor is the objection tenable that the statute in imposing such tax, conflicts with the last clause of the first section of the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall deprive any person within its jurisdiction of the equal protection of the laws. It is conceded that corporations are persons within the meaning of this amendment. It has been so decided by this Court. *Pembina Cons. Silver Co.* vs. *Pennsylvania*, 125 U. S., 181. But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation

applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected."

In the *State Railroad Tax Cases*, 92 U. S., 576, a statute of Illinois required a different rule of valuation and taxation, in regard to the property of railroads, than was provided for the property of others. The Court held that such a system was not in violation of the State Constitution, requiring uniformity of taxation, since it operated upon all of the class designated. In that connection, the Court said:

"But suppose it were otherwise; perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised, must, when we consider the immense variety of subjects which it necessarily embraces, be perfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature, and of the evidence upon which human judgment is founded."

In *Gibbons* vs. *District of Columbia*, 116 U. S., p. 407, where an Act of Congress was attacked, on the ground of unequal taxation, and because certain institutions in the District of Columbia were exempted from taxation, by reason of their use, it was said (p. 407):

"It is within the constitutional power of Congress, acting as the local Legislature of the District of Columbia, to tax different classes of property within the District at different rates."

And at page 408:

"In the exercise of this power Congress, *like any State Legislature*, unrestricted by constitutional provisions, may, *at its discretion*, wholly exempt certain classes of property

from taxation, *or may tax them at a* LOWER *rate than other property.*"

In *Railroad Company* vs. *Penniston*, 18 Wall., 5, at page 29, the Court says:

"That the taxing power of a State is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument, and that it may be exercised to an unlimited extent upon all property, trades, business and avocations existing or carried on within the territorial boundaries of the State, except so far as it has been surrendered to the Federal Government, either expressly or by necessary implication, are propositions that have often been asserted by this Court. And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence. No one ever doubted that, before the adoption of the Constitution of the United States, each of the States possessed unlimited power to tax, either directly or indirectly, all persons and property within their jurisdiction, alike by taxes on polls or duties on internal production, manufacture, or use, except so far as such taxation was inconsistent with certain treaties which had been made. And the Constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost or duty on imports or exports, except what may be absolutely necessary for executing the State's inspection laws. As was said in *Lane County* vs. *Oregon:* 'In respect to property, business and persons within their respective limits, the power of taxation of the States remained, and it remains entire, notwithstanding the Constitution. It is, indeed, a concurrent power (concurrent with that of the general government), and in the case of a tax upon the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but, with this qualification, it is absolute. The *extent* to which it shall be *exercised*, the *subjects upon which* it shall be *exercised*, and the *mode* in which it shall be *exercised*, are all equally within the *discretion* of the *Legislatures to which the States commit the exercise of the power*. That *discretion* is restrained only by the will of the people expressed in the State Constitutions, or through elections, and by the condition that it must not be so used as to burden or embarrass the operation of the National Government. There is

nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated, it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress.' Such are the opinions we have expressed heretofore, and we adhere to them now."

See also, to the same effect, *Williams* vs. *Supervisors*, 122 U. S., pp. 163, 164.

In the *Kentucky Railroad Tax Cases*, 115 U. S., 321, this question was presented, and, at page 337, disposed of in these words:

"But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the *discretion* of the legislative power, and there is nothing to forbid the *classification of property for purposes of taxation* and the *valuation of different classes by different methods*. The rule of equality, in respect to the subject, only requires the *same means and methods to be applied impartially to all the constituents of each class*, so that the law shall operate *equally* and *uniformly* upon *all persons in similar circumstances*. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the *value* of their property is ascertained. The different *nature* and *uses* of their property *justify the discrimination* in this respect which the *discretion* of the Legislature has seen fit to impose."

There is no conflict between the foregoing decisions of this Court and *People* vs. *Weaver*, 100 U. S., 539; *Board of Supervisors* vs. *Stanley*, 105 U. S., 305; *Hills* vs. *Albany Ex. Bank*, *Id.*, 319; and *Evansville Bank* vs. *Button*, *Id.*, 322; a group of cases involving a discrimination under State statutes, in the matter of taxing shares of stock in National Banks, in violation of the restrictive provisions of section 5219, of the revised statutes of the United States. An examination of these cases, and especially of *People* vs. *Weaver*, will show that the power of a State to make such discrimination is denied on the ground that, as the State's *sole right* to tax such stock is derived by a concessionary and restrictive statute of the United States, such power of

taxation in such case does not exist by virtue of the State's inherent sovereign right, and can *be exercised at all only under the limitations prescribed in the enabling Act of Congress*, which provides expressly that no State shall impose taxation upon such stock at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State.

Nor is the decision of the Circuit Court of the United States, in *Santa Clara tax case*, 9th Sawyer, 165, authority against the State's contention in this matter, because that decision, in so far as it dealt with the constitutionality of the mortgage provision in the Constitution of California, was not necessary to the determination of that case, as was said by this Court in *Santa Clara Co.* vs. *S. P. R. R.*, 118 U. S., p. 410; and again, because such decision is clearly in conflict with *Bells Gap. R. R.* vs. *Penn.*, 134 U. S., 232, and with *Pacific Express Co.* vs. *Siebert*, 142 U. S., 339, decided by this Court since such decision by the Circuit Court.

III.

THE METHOD PROVIDED BY THE CONSTITUTION AND STATUTES OF CALIFORNIA IN HAVING THE FRANCHISE, ROADWAY, ROADBED, RAILS AND ROLLING STOCK OF RAILROADS OPERATED IN MORE THAN ONE COUNTY ASSESSED BY THE STATE BOARD OF EQUALIZATION, AND SUCH ASSESSED VALUE APPORTIONED TO THE COUNTIES IN PROPORTION TO THE MILEAGE OF THE RAILWAY IN EACH COUNTY, DOES NOT DENY TO PLAINTIFF IN ERROR ANY RIGHTS SECURED TO IT UNDER THE XIV AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(Assignment of Error II.)

This point was not argued by plaintiff in error before the State Supreme Court, and by reason of such failure was, under the rule of that Court, waived and abandoned. We do not anticipate that plaintiff in error will seriously urge the negative of the above statement of the point since

this Court has impliedly, at least, affirmed such classification and method of assessment, under the Constitution and statutes of California, in *Santa Clara Co.* vs. *S. P. R. R.*, 118 U. S., 405, and in *California* vs. *Pacific R. R. Co.*, 127 U. S., 1. Such method of assessment and apportionment was expressly sustained in *S. F. N. P. R. R. Co.* vs. *State Board*, 60 Cal., 12. The underlying principles upon which the right exists in the State to classify property of this nature, considered in connection with its situation and use, have been heretofore discussed in this brief, with reference to the mortgages, and we submit this point upon the argument there made, and the following authorities:

Chicago, etc., R. R. Co. vs. *Iowa*, 94 U. S., 155.
State R. R. Tax Cases, 92 U. S. 575.
Pacific Express Co. vs. *Seibert*, 142 U. S., 339.
Bell's Gap. R. R. vs. *Penn.*, 134 U. S., 232.
Barbier vs. *Connelly*, 113 U. S., 27.
Columbus S. Ry. Co. vs. *Wright*, 151 U. S., 470.
S. F. U. P. R. R. Co. vs. *State Board*, 60 Cal., 12.

In connection with this point, it must be borne in mind that this method of assessment is only applied in California to the franchise, roadbed, roadway, rails and rolling stock of railroads operated in more than one county, and that other property of the railroad company, such as stations, warehouses, land, grants, etc., having a *situs* entirely within a county, are assessed and the taxes thereon collected by the county officers.

IV.

THE COLLECTION OF THE TAXES.

THE PROVISIONS OF THE STATUTE OF CALIFORNIA AS TO THE MODE OF COLLECTING TAXES UPON RAILROADS OPERATED IN MORE THAN ONE COUNTY DOES NOT DEPRIVE PLAINTIFF IN ERROR OF ANY RIGHTS SECURED TO IT UNDER THE XIV AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(*Assignment of Error 1.*)

In the State Supreme Court, plaintiff in error contended that the provisions of sections 3666 to 3671, inclusive, of the Political Code of California (Appendix p. 74), were special legislation in violation of sub. 10, section 24, article IV of the State Constitution; but no argument was made before that Court that such provisions were in violation of the XIV Amendment to the Constitution of the United States, and, consequently, under the established rule of decision of that Court, such contention was waived and abandoned. But, however this may be, a consideration of the point on the merits, will show it to have been entirely disposed of by the exhaustive and able opinion of Mr. Justice Harrison, delivering the decision of the State Supreme Court in these cases (Record, p. 262). We can add nothing to that opinion further than to say that it is as conclusive against the point raised in this Court on the XIV Amendment, as it was against the point in the State Court as to special legislation against the State Constitution.

In that opinion, it is most conclusively shown that the method of having these taxes collected by State officials, instead of by the county tax collectors, was rendered necessary from the method of assessment of railroads operated in more than one county, and to render the system harmonious and effective. It furthermore appears from that opinion and the statutes in question, that the system complained of, instead of discriminating against, operates rather in favor of plaintiff in error; for under it, the Railroad Company pays its county and State taxes to the State treasurer at the State capitol, while under the other system, it would have to make payments and settlements with as many different tax collectors as there are counties in which the railroad is operated. Plaintiff in error made no pretense of showing on the trial that this method of collecting its taxes subjected it to any burdens not borne by other taxpayers. The only provision in the statute having the least semblance of discrimination is the provision in section 3670 of the Political Code, that attachments might

issue in these cases without requiring attachment bonds. But as no attachment was sued out in either of these cases, the question does not arise; and, even if such one provision be unconstitutional, the entire statute would not be thereby invalidated (*People* vs. *Perry*, 79 Cal., 114).

Such provision as to attachments without bond is, however, not special or discriminating, because it has always been the law in California, since the adoption of the Codes in 1873, and under the express provisions of section 1058 of the Code of Civil Procedure of that State, "that no bond or security shall be required of the State, or the people thereof, or any officer thereof," in any civil action or proceeding in which the State or the people of the State is a party plaintiff. The form of complaint provided in section 3670 of the Political Code having been declared insufficient in *People* vs. *C. P. R. R.*, 83 Cal., 393, the complaints in these cases were amended in accordance with such decision.

Concluding on this point, we direct attention especially to *Columbus S. Ry. Co.* vs. *Wright*, 151 U. S., 470; a case arising out of precisely similar provisions in the statutes of Georgia to those in California, relative to the classification of railroads for purposes of assessment, and for collecting the tax thereon. As in these cases the point was made in the Supreme Court of Georgia that the method of collection was special in violation of the Constitution of that State, providing that taxes should be "collected under General laws." Such contention was disposed of by the Supreme Court of that State upon substantially the same ground taken by the Supreme Court of California in these cases (89 Ga., p. 595), viz.: on the ground that such classification of railroads was justified, because the nature of the property and its extension and operation through many counties, made it necessary to have the assessment made and the taxes thereon collected by State officials, instead of by the officers of the several counties. At page 470 of its opinion in *Columbus S. Ry. Co.* vs. *Wright*, this Court said: "Upon this writ of error we can-

not, of course, review the construction which the Supreme Court of the State has placed upon its own Constitution and the Act in question."

V.

THE COUNSEL FEES.

(*Assignments of Error VI, VII, XVII.*)

THE STATE SUPREME COURT HAS HELD IN THESE CASES THAT THE COUNSEL FEES AWARDED BY THE TRIAL COURT TO COUNSEL EMPLOYED BY THE STATE CONTROLLER TO PROSECUTE THEM, WERE PROPERLY AWARDED UNDER THE STATUTE OF CALIFORNIA, AND NO FEDERAL QUESTION IS PRESENTED IN RELATION THERETO.

While we do not see how any Federal question is involved in this matter, in view of the decision of the State Supreme Court, construing and sustaining the State statute under which the counsel fees were awarded in the judgment (Record, p. 270), and affirming the finding of fact as to the amount of the counsel fees to Langhorne & Miller, yet in answer to the assignments of error, we submit the following:

Section 3670 of the Political Code of California provides that the complaints in these actions shall be signed by the State Controller or his attorney; and further provides that, if plaintiff recover judgment, there shall be included in such judgment as counsel fees *such sum as the Court may determine to be reasonable and just.* (Appendix, p. 79.) Sub. 16, section 433 of the Political Code also makes it the duty of the State Controller "to direct and superintend the collection of all moneys due the State." The State Court allowed as such counsel fees to the firm of Langhorne & Miller, the attorneys employed by the Controller to institute and prosecute these actions (Record, p. 153, folio 311), a sum equal to seven and one-half per cent. upon the *principal* of the taxes found, as to each cause of action, delinquent and unpaid. There is a distinct alleg-

gation in each of the causes of action in the complaint, as to the reasonable compensation to be paid counsel for the defendant in error. (Record, p. 12, folio 27.) That the firm of Langhorne & Miller was employed by the State Controller to conduct the cases appears from the evidence and from the entire record in the case, and such employment has never been disputed. Being so employed, and subject to having their compensation fixed by the Court, under the express provisions of section 3670, Political Code, above-mentioned, it is clear that no formal contract, at the commencement of the cases, fixing the amount of their fees, was either possible or required, under the statute that expressly gave to the Court the power to fix such fees. The State Board of Examiners is not given any such power, and the power of that board, under section 3668, Political Code, is confined to auditing contingent expenses of actions, to be paid out of the penalty funds collected in this class of cases.

That the contingent expenses referred to in that section do not include counsel fees is evident on reading section 3670, which gives, as we have seen, the power of settling the amount of such counsel fees to the Court, *and to no other tribunal or board*. Nor are such counsel fees contingent in the sense claimed by plaintiff in error, who claims that the Court had no right to fix the fees, because it was (it says) admitted on the trial that the counsel fees were contingent. If contingent, they could be so only by virtue of some contract to that effect between the State and its counsel. No such contract was ever made or proven in these cases, and the fact that the former Attorney-General, W. H. H. Hart, in the examination of a witness, appears to have given his gratuitous opinion that such counsel fees were contingent (Record, p. 158, folio 321), could not bind either the State or the firm of Langhorne & Miller, because in these cases, as was decided by the Supreme Court of California, the controller, and not the Attorney-General, was the State officer entitled to prosecute and employ counsel therefor (Record, p. 271).

There is no statute of the State requiring the fees of counsel employed to conduct State cases, to be fixed at any certain sum at the time of their employment, and in the absence of such statute, the State is certainly bound to pay counsel the reasonable value of their services. There is at least a contract, and consequent liability of the State to that extent. (*In re Paschal*, 10 Wall., 485–493; *Huffman* vs. *Greenwood County*, 23 Kan., 281; *Smith* vs. *Sacramento*, 13 Cal., 531.) The Legislature has distinctly recognized such liability on the part of the State in these cases, by enacting section 3670 of the Political Code, providing that the State shall recover a reasonable counsel fee; for, if the Legislature had not intended the State to become liable to pay its attorneys employed in these cases a reasonable fee for their services, what then could have been the purpose of enacting in section 3670 that the State should recover of plaintiff in error a reasonable attorney's fee? The liability, then, of the State to pay its attorneys a reasonable fee attaches, by *virtue of that statute*, and under the statute the Court is expressly given full power to recognize such liability and determine the fee. We think these considerations a complete answer to the contention that the Court could not allow a fee under this statute, because it did not appear that the State was liable to pay one. The cases cited by counsel in the State Court are not in point.

In *Bank of Woodland* vs. *Treadwell*, 55 Cal., 379, the attorney was not allowed the reasonable value of his services for foreclosing a mortgage, because by *express contract* with the bank he had to perform *all* its legal work for the munificent compensation of $10 a month.

Prescott vs. *Grady*, 91 Cal., 518, simply decides that the defendant in a foreclosure case may raise an issue as to what is a reasonable counsel fee, notwithstanding the stipulation as to such fee in the mortgage.

In *Ellis* vs. *Woodburn*, 89 Cal., 129, the attorney, by *express contract*, was to get a contingent fee, and in such case the Court held that evidence of the reasonable value of the services was inadmissible.

The statute (3670 *of the Political Code*) proceeds upon the same theory as the statute allowing a mortgagee a reasonable fee for his attorney on foreclosure. The law contemplates that both the mortgagor and the taxpayer shall meet their obligations without putting the mortgagee and the State to the necessity and expense of litigation, and that the expense of such litigation should be borne by the party in default. In neither case is the violent presumption to be indulged that, attorneys will render their services for nothing, and as the mortgagee in the one case, and the State in the other are, by their mere employment of attorneys to institute the necessary actions, bound in law to pay them a reasonable compensation, the statutes have provided in each class of cases that, the plaintiff shall be secured and reimbursed by recovering such sum in the judgment as the Court may determine to be a reasonable counsel fee. We think the analogy between the statutes authorizing the recovery of a reasonable counsel fee in actions to foreclose mortgages and in tax cases of this character, to be complete. A great deal of labor was necessarily expended at the commencement of these cases, in amending the complaints in accordance with the decision in *People* vs. *C. P. R. R. Co.*, 83 Cal., 293, holding the form of complaint prescribed by section 3670 insufficient. Complete and separate causes of action for State taxes and for the taxes of each county involved had to be prepared in each case, setting forth all the facts relating to the assessment of the property, the apportionment of the assessed values, the levy of the taxes, and defendant's delinquency, including the description of defendant's railroad, not only in the State, but also in each county. In addition to this, said firm filed a brief, and argued the demurrers to the amended complaints, prepared the cases for trial, took part in the trials, performed a great deal of labor in amending the statements on the motions for new trials, and the Records on appeal in the State Court. The services of said firm throughout the entire case are displayed before this Court by the voluminous records and briefs of counsel,

disclosing all the proceedings and the many questions raised against a recovery by the thirty-five assignments of error in this Record.

The amount of taxes involved being large, the responsibility of the attorneys employed by the controller for the State, was proportionately great; and we believe it to be the true and well-established rule that counsel fees should not only be measured by the amount of labor actually performed, but, also, in a great degree, by the responsibility imposed by reason of the importance of the case and the amount involved (Weeks on Attorneys, 2d ed., note 3, p. 694). On the trial, plaintiff in error introduced no proofs to assist the Court in determining a proper value for such counsel fees. The State, however, introduced the testimony of several witnesses, whose estimates fixed their value at from twenty-five to ten per cent. of the amounts involved (Record, pages 156, 158, folios 316, 319).

As before stated, the measure of compensation allowed by the trial Court to the firm of Langhorne & Miller, and affirmed by the Supreme Court of California, was seven and one-half per cent. upon the *principal* of the several taxes recovered. Considering the entire Record, the amounts and questions involved, and the services performed, we do not think it manifestly appears that the State Court abused its discretion in the allowance of such counsel fees. An analogy supporting the Court's action is found in section 3900 of the Political Code, providing that counsel fees equal to ten per cent. of the taxes shall be recovered in actions brought to recover taxes due and unpaid by persons required to pay the same to county tax collectors.

VI.

THE FIVE PER CENT. PENALTY WAS PROPERLY INCLUDED IN THE JUDGMENT.

(Assignment of Error VIII.)

This point was not argued before the State Supreme Court, but under the rule of that Court was waived therein. Plaintiff in error maintains that the State Court should not

have allowed the penalty of five per cent. upon the several principal sums of the delinquent State and county taxes, because it is said such penalty was not in fact added to the delinquent taxes. Section 3668 of the Political Code provides that the controller, within ten days after the fourth Monday in October, shall publish a notice that he had received from the State Board of Equalization the duplicate record of assessments of railways, and the duplicate record of apportionment of railway assessments; that the taxes were then payable and would be delinquent on the last Monday in December next at six o'clock P. M.; and that unless paid to the State Treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof. Said section provides further that all such taxes become delinquent at the time last mentioned, and that "thereafter there must be collected by the State Treasurer, or other proper officer, an addition of five per centum." (Appendix, p. 76.)

It is alleged in the complaint, and was found by the trial Court as to such cause of action, that the controller published this notice; and it further appears that this five per cent. was by the controller *in fact added to the delinquent taxes*, and written in pencil upon the duplicate record of apportionment of railway assessments in the ninth, tenth and eleven columns thereof, opposite the sign "†" and just over the delinquent tax in each instance, except that in the eleventh column, the five per cent. upon the total delinquent taxes due from plaintiffs in error is given (Record, p. 151, folio 307). There is nothing in the statute requiring this five per cent. to be added to the delinquent tax in *ink*. If the indication of the amount of this penalty upon this record be required at all, then the statute would be fully complied with by indicating it either in pencil or in ink, or by type-writing or printing, in any manner that would enable it to be read. But it is immaterial whether this percentage was indicated in ink or in pencil, and its presence on this record is mere surplusage and unnecessary, for this penalty is added to the de-

linquent tax *by operation of the statute itself*, and attaches under the statute *at the instant and because of the delinquency*. The only things the Controller is obliged by the statute (Sec. 3667 Political Code) to enter upon this duplicate record of apportionment are the several rates of tax levies, and a computation of the State and county taxes due under such rates. He is not required by any provision of the statute to compute or enter upon this duplicate record, or upon any record, this five per cent. penalty.

The statute imposes this penalty *in express terms* in providing that, after the tax becomes delinquent, there must be collected by the State Treasurer, or other proper officer, an addition of five per cent. By section 3670, Political Code, the Controller is required to institute this action for the recovery of taxes appearing delinquent upon said duplicate record, and the form of complaint given in that section provides that there shall be recovered, in addition to such delinquent taxes, five per cent. thereon for non-payment. The provision in section 3670 is in itself sufficient to authorize the collection of this percentage.

People vs. *Seymour*, 16 Cal., 344.
People vs. *Todd*, 23 *Id.*, 184.

VII.

THE ASSESSMENTS WERE PROPERLY APPORTIONED.

(*Assignment of Error V.*)

This alleged error was not argued by plaintiff in error before the State Supreme Court, but under rule of that Court was waived.

It is contended that the State and county taxes here involved are invalid because the assessed value of the entire railroad in the State was, by the State Board of Equalization, apportioned only to the counties and cities and counties in which the railroad was located, and was not also apportioned by said board to the cities, towns, townships, and lesser taxing districts within said counties and cities and counties.

1. *The Constitution does not require the apportionment to the lesser taxing districts within the counties to be made by the State Board of Equalization.*

There is no requirement in section 10, Art. XIII, of the State Constitution, nor in any other part of the Constitution, that the State Board of Equalization shall make any apportionment of any railroad assessment to any county, city and county, or lesser taxing or other sub-division or district within the State. The only duty imposed upon said board by the section cited, is that of *making the assessment* of railroad property. The Constitution does not undertake to provide what board or agency shall make the apportionment of the assessment, as to that it is silent and not self-executing. It provides that such apportionment shall be made to the counties, etc., according to mileage, but it was left to the Legislature *to provide the agency*, by which such apportionment is to be made.

Section 13 of the same Art. XIII of the State Constitution provides that "The Legislature shall pass all laws necessary to carry out the provisions of this article." (Appendix, p. 69). Under said constitutional provisions, the Legislature in 1883 passed sections 3664 to 3671, inclusive, of the Political Code, requiring the State Board of Equalization to make such apportionment to the counties and cities and counties and to report such apportionment to the counties and cities and counties. Whereupon, the Board of Supervisors were required to take such apportionments to their respective counties, and apportion the same to the lesser taxing districts within the counties. It must be obvious that this manner of apportionment is the only reasonable and practicable method possible, to effectually carry out the constitutional system of assessing railroads operated in more than one county. In every county in the State there are many lesser taxing districts, such as townships and school districts, embracing but a portion of the county, and in which local taxes are levied for special purposes. The creation of these districts, the changes in their boundaries,

and the levy of taxes therein for purely local purposes, such as building a school house, are solely within the jurisdiction and power of the Board of Supervisors of the county.

In these cases the assessments were made by the State Board of Equalization, as required by the Constitution, and by said State Board apportioned to the counties and cities and counties, and by the boards of supervisors apportioned to the lesser taxing districts within the counties, for purposes of local district taxation, as required by the statute (See Admission, Record, p. 152, folio 308).

2. *As these actions are for State and county taxes only and not for the tax levied in any lesser taxing district within a county, the failure of the State Board of Equalization (even if required to do so) to make the apportionment to the lesser taxing districts within a county, could in no manner prejudice plaintiffs in error, nor afford any defense.*

These actions are for the recovery of *State and county taxes only*, and not for the recovery of a tax levied in any lesser taxing district within a county; consequently, we have nothing to do with any such taxes, and the manner of assessment, levy and collection of such local taxes, is entirely immaterial and outside of these cases.

In *S. F. and N. P. R. R. Co.* vs. *State Board of Equalization*, 60 Cal., 34, it was contended that the assessment was void, because the record of the State Board of Equalization only showed, as it does here, an apportionment by said State Board to the counties and cities and counties, and not to the cities, towns and other lesser taxing districts within a county; but the Supreme Court of California decided that the apportionment by the State Board to the counties was "a single act complete in itself." This being so, the apportionment of the assessment by the State Board to all the counties and cities and counties in which the railroad was located, according to the mileage therein respectively, is, under said decision, a single act complete in itself, for the purpose of levying at least State and county taxes. If there is anything in the point raised, it might

be urged against an action to recover a local tax, levied within a lesser taxing district within the county; but it manifestly has no application here.

VIII.

THE STATE AND COUNTY TAXES SUED FOR, ARE NOT BLENDED WITH ANY LOCAL TAXES LEVIED IN ANY LESSER TAXING DISTRICT WITHIN ANY COUNTY.

(Assignment of Error V.)

This point was not argued before the Supreme Court of California, but was waived in that Court. It is contended that the levies of State and county taxes relied on are void, for the alleged reason that such levies included taxes levied by the Board of Supervisors in certain lesser taxing or school districts within the counties. It must be borne in mind, in the first place, that the duplicate record of apportionment with the tax rates and amounts due extended thereon, as provided in section 3667 of the Political Code of California, is by section 3670 of the same code made "*prima facie* evidence of the assessment, the property assessed, the delinquency, the amount of the taxes due and unpaid to the State and counties, or cities and counties, therein named, and that the corporation, person or association is indebted to the people of the State of California in the amount of taxes, State and county, city and county, therein appearing unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with." (Appendix, p. 79.)

Accordingly, if there existed such blending of tax levies as alleged by plaintiff in error, the burden of proving the same to the satisfaction of the trial Court rested upon it. On the trial, there were introduced by plaintiff in error the tax levies in a number of the counties (Record, pp. 195 to 205), which, upon inspection, wholly negative the contention. The orders of the boards of supervisors show upon their face that, the State and county taxes were levied entirely separate from, and that they were in no

manner blended with, the taxes levied for school purposes. Plaintiff in error assumes to misunderstand the two rates of county taxes appearing upon the Record (Record, p. 151). These different rates simply mean that the counties which reported them to the controller, have levied a county road tax, which, under the statute (*Martin* vs. *Aston*, 60 Cal., 63), does not apply to incorporated cites and towns within the county. By comparing said two rates as to any county, with the order levying county taxes for such county, it will be seen that the difference between the rates of levy is the amount of road tax levied for county purposes; one rate being the county taxes, including the county road tax, levied upon all property in the county outside of incorporated cities and towns, while the other rate is the county (not city or town) tax, exclusive of the county road tax, levied upon all property within incorporated cities and towns. Any special tax levied by any incorporated city or town for its own municipal purposes, would be a special and local tax—in no sense a county tax—and if any such were levied upon the properties of plaintiffs in error, they were not included in the rates of levies for county purposes, reported by the counties to the controller and extended by him in said duplicate Record. This fully and clearly appears from a consideration of the orders levying county taxes, compared with said duplicate Record. The finding of the lower trial Court (Record, p. 142, folio 292) that there was no such blending of county and district taxes, as claimed by plaintiff in error, is fully supported by the evidence. Furthermore, these actions were not brought to recover any tax local to an incorporated city or town, and no taxes are included in the judgments except the State and county taxes.

IX.

THE ASSESSMENTS OF THESE RAILROAD COMPANIES WERE EQUALIZED.

(*Assignment of Error XII.*)

This alleged error was not argued before the State Supreme Court, and under the rules thereof was waived.

The function of the State Board of Equalization in California is to equalize, for purposes of *State taxation*, the assessments made by the county assessors, some of which may be too low and some too high; in other words, to equalize the assessed values throughout the State, for the purpose of levy thereon of the State tax rate, to raise the State taxes as distinguished from the county taxes. The *only assessment*; however, upon the franchises, roadway, roadbed, rails and rolling stock of these companies, for the *levy of both State and county taxes*, is made by the State Board of Equalization, upon such property treated as a uuit, and such assessed valuation is apportioned among the several counties, according to mileage in each. The assessed value of these properties is, therefore, made equal in each county, by the assessment itself, and perfect equalization thereof is thus accomplished throughout the entire State, and no further or other equalization is either necessary or possible. This system deprives these companies of no substantial rights, for the same statute in section 3665 of the Political Code of California (Appendix, p. 74), gives them the right to subsequently apply to the board for a correction of this assessment *in any particular*.

X.

THE STATE TRIAL COURT DID NOT ERR IN EXCLUDING THE TESTIMONY OF MASLIN.

(*Assignments of Error XXIV, XXV, XXVI, XXVII.*)

Plaintiff in error sought to have Maslin testify in impeachment of the record of assessment, and to the effect that the State Board of Equalization had assessed the Federal franchise in 1887. Mr. Maslin was not even a member of the board. He was its secretary, but even that position could not in any degree qualify him to contradict the assessment. As before contended by us in this brief, we do not think it permissible for even a member of this board to contradict and stultify the record of the assessment made by him, at the instance of the taxpayer against whom such record is asserted, or to testify that, in making

such assessment and record, he took into consideration and included (but did not so express in the written record of his judgment) a Federal franchise which, under section 1, Art. XIII of the State Constitution, he was prohibited from including, and which inclusion would render the assessment void. If the testimony of a member of this board is not competent for such purpose, certainly that of a mere secretary or clerk, whose duties are solely ministerial, would be even more inadmissible to contradict and impeach a determination and judgment, judicial in character. The testimony of this secretary was as incompetent as would be the parol testimony of the clerk of a Court, should he be called to impeach and show a judgment of the Court to be invalid, because of some act or statement made by a Judge thereof when considering a case, but which act or statement constituted no part of the record. The cases relied on by plaintiff in error in the State Court, do not sustain the proposition that the secretary of this board can by his parol testimony impeach and nullify the judgment of the board.

In *People* vs. *Lansing*, 55 Cal., 393, the sole question was whether, as matter of fact, the District Assessor *had acted at all* in making an assessment, or had simply copied the alleged assessment from the county assessment. The Court held that the assessor himself might be asked whether he had in fact made the assessment. The proposition there was the existence of any assessment at all. While here, there is no doubt that the assessing board did consider and make an assessment.

In *Board of Education* vs. *Keenan*, 55 Cal., 642, there was no attempt to contradict by parol the Commissioner's map, or to show it to be illegal and void, and parol testimony was there admitted, because the coloring of the map had faded, and for the purposes of showing its condition when first filed, and because, as the Court said, such testimony *was not contradictory* of the map (p. 646).

But, in addition to what has been said, the testimony of this witness, and the offers in connection therewith,

were inadmissible on the further ground mentioned in the decision in these cases by the Supreme Court of California, at page 269 of the Record, to the effect that the intention of the board, or of any of its members, or the signification to be given the term "franchise" as used in the assessment, could not be shown by the witness, nor could his evidence be used for impeaching the testimony of the members who had testified for the State, unless such members had been *previously asked* when being examined as witnesses, for the purpose of laying the foundation for any such impeachment, whether or not they had expressed any such opinions or intentions to the witness as was sought to be proved by his testimony. This is a familiar rule relating to the introduction of impeaching evidence, as provided in section 2052 of the Code of Civil Procedure of California, and as no such foundation had been laid in this instance for the introduction of such testimony by the witness Maslin, his testimony was properly excluded.

XI.

THE STATE TRIAL COURT DID NOT ERR IN RULING THAT MR. WILCOXON COULD NOT BE CROSS-EXAMINED AS TO ORAL STATEMENTS HE HAD MADE ABOUT ASSESSMENTS FOR YEARS OTHER THAN 1887.

(*Assignment of Error XXX.*)

The Record in this matter will be found between pages 213 and 216. The direct examination of this witness (who was at the time in a very feeble condition of health) had been confined by defendant in error to the assessments for 1887. On cross-examination plaintiff in error undertook to mix the witness up on the assessments made by the board from 1880 to 1888, and especially sought to confuse him as to whether a decision referred to by him was the one rendered by the Circuit Court, or that rendered by the Supreme Court of the United States, in relation to assessing Federal franchises. But the only ruling of the Court

as to this witness that was urged in the State Supreme Court as error, was made in connection with the endeavor to impeach the witness upon cross-examination, with regard to his testimony taken before a committee of the Legislature. This was objected to, and the trial Court sustained the objection to so much of the proposed testimony as did not relate to the assessments for 1887. In passing on the objection, the Court expressly ruled that plaintiff in error could introduce the proposed evidence for 1887 (Record, p. 214, folio 422). But counsel did not see fit to take advantage of the Court's ruling, or to pursue the matter further. Under the Court's ruling, counsel could have examined the witness fully as to everything he had stated before that ivestigating committee in relation to the assessments for 1887; but the counsel, for reasons best known to themselves, abandoned any further examination on that point.

We fail to see how plaintiffs in error can complain, or how they were in any manner prejudiced by this ruling of the Court, which was clearly in their favor, and permitted cross-examination of the witness as fully as they might have desired as to everything he had said and done, either before this investigating committee or elsewhere, relative to the assessments sued on, and which were the only assessments concerning which he had been examined in chief.

XII.

THE STATE TRIAL COURT DID CONSIDER THE PAROL EVIDENCE INTRODUCED BY DEFENDANTS TO IMPEACH THE ASSESSMENTS.

(Assignment of Error IX.)

It is claimed that the State trial Court excluded from its consideration the parol evidence introduced by plaintiffs in error, to impeach the assessments, and that such exclusion appears from a portion of the opinion of the judge of the trial Court, in which he said, in effect, that even if the parol evidence referred to did not weigh in favor of defendant in error, he thought the Court would have to dis-

regard it as incompetent, as its effect would be to contradict the record.

In the first place, the *opinion* of the judge of the trial Court is not part of the record on appeal, and could not, under the statute defining a record on appeal in California, be made a part of such record.

Hayne on New Trial and Appeal, Sec. 248.

In the next place, the lower trial Court, in its written opinion, did fully discuss and consider this parol testimony, and held it to be wholly insufficient in weight, even if competent in character, to impeach the record of the assessments. The portion of the opinion of the trial Court under consideration (Record, p. 225, folio 442) clearly shows that the judge had considered such parol testimony, and had found it without weight, irrespective of its competency, and the Supreme Court of the State has expressly so decided in its decision in these cases (Record, p. 268).

XIII.

THE STATE TRIAL COURT DID NOT ERR IN PERMITTING WITNESS DUNN TO TESTIFY AS SET FORTH IN ASSIGNMENTS OF ERROR XXXI, XXXII, XXIII, XXXIV, XXXV.

These alleged errors were not argued by plaintiff in error before the State Supreme Court; but, under the rule of that Court, were waived and abandoned. The first two of these assigments of error relate to the meaning of the term "franchise," as used by the State Board of Equalization in its blank form, furnished the railroad company, to be filled out by the company in giving a description of its property subject to taxation (Record, pp. 219, 220, folios 431, 432). The witness was a member of this board, and since plaintiff in error claimed on the trial that the use of the term "franchise" in its own verified statement, and in the assessment, was ambiguous, and since it had been permitted to attack the record of the assessment and its terms by the testimony of Morehouse, it was certainly

competent for the State to offer proofs in rebuttal, in relation to the language used in this statement. The other three assignments of error relate to the admission of the testimony of this witness, as to the statements made by the agent of the railroad company before the Board, as to whether or not it claimed that the term "franchise" as used by it in its statement of property subject to taxation was ambiguous or included any franchise other than that derived from the State (Record, p. 220, folios 432–3). In view of the attacks and claims made by plaintiff in error, on its own verified statement and the assessment, we think the evidence clearly admissible in rebuttal.

XIV.

THE STATE TRIAL COURT DID NOT ERR IN PERMITTING WITNESS WILCOXON TO TESTIFY AS SET FORTH IN ASSIGNMENTS OF ERROR XXVIII, XXIX.

These alleged errors were not argued by plaintiff in error before the State Supreme Court, but under the rule of that Court, were waived and abandoned. As to the first of the alleged errors, we see no possible objection to permitting the witness, who was a member of the Assessing Board, to testify in rebuttal that whatever action the board took, in relation to these assessments, was made matter of record (Record, p. 206, folios 405–6). The objection to the question asked the witness as to assessment of any part of the Bay as part of the roadbed, was based on the sole ground that the question was leading (Record, p. 208, folio 409). It is a rule of practice in California, under section 2046, Code of Civil Procedure, that a leading question is permissible in the discretion of the trial Court. Moreover, the answer to the question in no degree prejudiced plaintiff in error, that had not offered to prove on the trial that any Bay had been improperly included in the assessment.

XV.

THE LOWER TRIAL COURT DID NOT ERR IN SUSTAINING THE STATE'S OBJECTION TO AN OFFER TO PROVE CERTAIN THINGS BY THE WITNESS MOREHOUSE (*Assignment of Error XXI*), NOR IN PERMITTING CERTAIN QUESTIONS TO BE ASKED SAID WITNESS ON HIS CROSS-EXAMINATION (*Assignments of Error XXII, XXIII*).

These alleged errors were not argued by plaintiff in error before the State Supreme Court, but under the rule of that Court, were waived and abandoned.

The first of the above alleged errors is claimed, because the Court disallowed an omnibus offer to prove by the witness that from 1883 to 1888, the Federal franchise had been assessed by the State Board of Equalization (Record, p. 184, folio 364). The only assessment under consideration was that for the year 1887, and the witness had already testified as to everything he knew about that assessment. What the board might have done in prior years was not relevant or material under the issues and pleadings that related solely to the assessment for 1887. Consequently, the offer of proof was properly disallowed, in the form it was made, because it contained matters immaterial and irrelevant, thus violating the elementary rule that an offer of proof must be a specific offer of relevant proof, and must not be too broad (*Smith* vs. *E. B. M. Co.*, 54 Cal., 164; *Schroeder* vs. *Schmidt*, 74 *Id.*, 459).

As to the other alleged errors, it was perfectly proper to permit the witness to be cross-examined as to the statements furnished by the railroad companies, and as to what he intended by the use in the assessment of the expression, "The assessment of the franchise, roadway, roadbed, rails and rolling stock." (Record, pp. 187–8, folios 371–373.) Every latitude should have been allowed the State in the cross-examination of this witness, because he had been introduced by the plaintiff in error to contradict, if possible, the record of the assessments, made by the board of which he was a member. Such cross-exam-

ination was, furthermore, proper because it was directed to the very matters concerning which the witness had been examined in chief.

XVI.

THE LOWER TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO INTRODUCE IN EVIDENCE THE DUPLICATE RECORD OF ASSESSMENTS OF RAILWAYS FOR 1887, AND THE DUPLICATE RECORD OF APPORTIONMENT OF RAILWAY ASSESSMENTS FOR THAT YEAR.

(*Assignments of Error XIII, XIV.*)

These alleged errors were not argued by plaintiff in error before the State Supreme Court, but, under the rule of that Court, were waived and abandoned.

By the provisions of section 3670 of the Political Code (Appendix, p. 79), these records constitute the warrant to the State Controller, to demand the taxes, and to institute actions therefor if not paid; and they are by that statute made *prima facie* evidence upon action brought of the regularity of all the proceedings, and of the right of the State to recover judgment.

XVII.

THE STATE TRIAL COURT DID NOT ERR IN PERMITTING DEPUTY STATE CONTROLLER DOUGLASS TO TESTIFY THAT THE TAXES SUED FOR HAD NOT BEEN PAID, NOR IN DENYING THE MOTIONS FOR NONSUIT.

(*Assignments of Error XV, XVI, XVIII.*)

These alleged errors were not argued by plaintiff in error before the State Supreme Court, and under the rule of that Court, were waived and abandoned.

As plaintiff in error never pretended that it had paid the taxes sued for, nor in its answer denied the allegation in the complaint as to non-payment, the evidence of the deputy State Controllor to such non-payment was doubtless unnecessary; but its admission could in no manner prejudice

plaintiff in error. The motion for nonsuit was properly denied, because upon the introduction of the duplicate record of railway assessments, and of the duplicate record of the apportionment of such assessments, together with the failure of the answer to deny non-payment, the State had established a *prima facie* case, under the express provisions of section 3670 of the Political Code (Appendix, p. 79).

IN CONCLUSION.

We repeat the statement made by us at the beginning of this brief, to the effect that the only Federal question presented in the record of these cases is, whether or not the acquirement by these railroad companies of Federal franchises merged their State franchises so as to render the latter untaxable. But, however this may be, we submit that the State has fully answered, on the merits, all of the alleged errors assigned, and that the judgment and decision of the Supreme Court of California should be affirmed in each of the cases.

Respectfully submitted.

W. F. FITZGERALD,
Attorney-General of the State of California.
J. P. LANGHORNE,
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For Defendants in Error.

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For Defendants in Error.

APPENDIX.

THE FOLLOWING ARE THE SECTIONS OF THE CONSTITUTION OF THE STATE OF CALIFORNIA, ADOPTED MAY 7, 1879, REFERRED TO IN THE BRIEF:

ARTICLE XIII.

REVENUE AND TAXATION.

SECTION 1. All property in the State, *not exempt under the laws of the United States*, shall be taxed in proportion to its value, to be ascertained as provided by law. The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, *franchises*, and all other matters and things, real, personal and mixed, capable of private ownership; *provided*, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits or debts due to *bona fide* residents of this State.

SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, *for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby.* Except as to railroad and other quasi-public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, *and the value of such security shall be assessed and taxed to the owner thereof*, in the county, city or district in which the property affected thereby is situate. The taxes so levied *shall be a lien* upon the property *and security*, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax

so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.

SEC. 5. Every contract *hereafter made*, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as any interest specified therein, and as to such tax or assessment, be null and void.

SEC. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts.

SEC. 13. The Legislature shall pass all laws necessary to carry out the provisions of this article.

EXTRACT FROM THE PRINTED OFFICIAL RECORD OF THE PROCEEDINGS OF THE CONVENTION FRAMING THE CONSTITUTION OF CALIFORNIA, ADOPTED MAY 7, 1879, BEING A STATEMENT IN THAT CONVENTION BY THE CHAIRMAN OF THE COMMITTEE ON REVENUE AND TAXATION, RELATIVE TO SECTION 4, ARTICLE XIII OF SAID CONSTITUTION, AS TO NON-DEDUCTION OF RAILROAD MORTGAGES.

(*Vol. II, p. 908, California Constitutional Convention, 1878–1879.*)

"Mr. EDGERTON. 'If the gentleman will withdraw a moment I will renew the motion. I have been asked by three or four gentlemen, since the Convention took a recess, what was the meaning of this exception, 'except as to railroad and other quasi-public corporations,' why these corporations are exempted. It was made to appear to the Committee on Revenue and Taxation that the railroad companies were in debt in very large sums, in the form of bonds, and that those bonds were held in Europe, New York and other places outside of this State. Now, sir, under a decision of the Supreme Court of the United States—the decision referred to by the gentleman from Los Angeles the other day—it has been held that these bonds are not within the jurisdiction of the State, and cannot be taxed. So, unless this exception is made, the railroad companies will have a good thing of it. When the assessor came to assess them they would deduct the amount of these bonds from the value of their property here, and the bonds being out of reach of the State, the State would get very little tax.' "

PROVISIONS OF THE POLITICAL CODE OF CALIFORNIA.

THE FOLLOWING ARE THE PROVISIONS OF THE POLITICAL CODE OF CALIFORNIA IN FORCE IN 1887 RELATING TO THE ASSESSMENT, APPORTIONMENT OF ASSESSED VALUES, AND COLLECTION OF STATE AND COUNTY TAXES UPON THE FRANCHISE, ROADWAY, ROADBED, RAILS AND ROLLING STOCK OF RAILROADS OPERATED IN MORE THAN ONE COUNTY. THESE PROVISIONS HAVE BEEN SINCE AMENDED IN MINOR PARTICULARS, NOT APPLICABLE TO THE TAXES FOR THE FISCAL YEAR 1887:

ASSESSMENT OF RAILROADS.

SEC. 3664. The President, Secretary, or Managing Agent, or such other officer as the State Board of Equalization may designate, of any corporation, and each person, or association of persons, owning or operating any railroad in more than one county in this State, shall, on or before the first Monday in April of each year, furnish

the said board a statement, signed and sworn to by one of such officers, or by the person or one of the persons forming such association, showing in detail for the year ending on the first Monday in March in each year:

1. The whole number of miles of railway in the State, and where the line is partly out of the State, the whole number of miles without the State and the whole number within the State, owned or operated by such corporation, person or association.

2. The value of the roadway, roadbed and rails of the whole railway, and the value of the same within the State.

3. The width of the right of way.

4. The number of each kind of all rolling stock used by such corporation, person or association in operating the entire railway, including the part without the State.

5. Number, kind and value of rolling stock owned and operated in the State.

6. Number, kind and value of rolling stock used in the State, but owned by the party making the returns.

7. Number, kind and value of rolling stock owned but used out of the State, either upon divisions of road operated by the party making the returns or by and upon other railways.

Also showing in detail for the year preceding the first of January:

1. The gross earnings of the entire road.

2. The gross earnings of the road in the State, and where the railway is let to other operators, how much was derived by the lessor as rental.

3. The cost of operating the entire (road), exclusive of sinking fund, expenses of land department and money paid to the United States.

4. Net income for such year and amount of dividend declared.

5. Capital stock authorized.

6. Capital stock paid in.

7. Funded debt.

8. Number of shares authorized.

9. Number of shares of stock issued.

10. Any other facts the State Board of Equalization may require.

11. A description of the road, giving the point of entrance into and the point of exit from each county, with a statement of the number of miles in each county. When a description of the road shall once have been given no other annual description thereafter is necessary, unless the road shall have been changed. Whenever the road, or any portion of the road, is advertised to be sold, or is sold for taxes, either State or county, no other description is necessary than that given by, and the same is conclusive upon, the corporation, person or association giving the description. No assessment is invalid on account of a misdescription of the railway or the right of way for the same.

If such statement is not furnished as above provided, the assessment made by the State Board of Equalization upon the property of the corporation, person or association failing to furnish the statement is conclusive and final.

ASSESSMENT, HOW MADE.

SEC. 3665. The State Board of Equalization must meet at the State Capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the Board must assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the Assessor of the county wherein they are situate. Within ten days after the third Monday

in August, the Board must apportion the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of each railway to the counties, or cities and counties in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The Board must also, within said time, transmit by mail to the County Auditor of each county, or city and county, to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the whole of said track within the county, or city and county, including the right of way by metes and bounds, or other description sufficient for identification, the assessed value per mile of the same as fixed by a pro rata distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within the State, and the amount apportioned to the county, or city and county. The Auditor must enter the statement on the assessment roll or book of the county, or city and county, and where the county is divided into assessorial townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation, either of the county, city and county, or such township or district. On the first Monday in October the Board of Supervisors must make, and cause to be entered in the proper record book, an order stating and declaring the length of main track of the railway assessed by the State Board of Equalization within the county, the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road district, or lesser taxing district in the county, or city and county through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the assessment value of said property for taxable purposes

in such city, town, township, school, road, or other district; and the clerk of the Board of Supervisors must transmit a copy of each order or equalization to the City Council, or Trustees, or other legislative body of incorporated cities or towns, the Trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes, as the property of individuals within such city, town, township, school, road, and lesser taxation districts respectively. *If the owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by the board, such owner may, at the meeting of the board, under the provision of section 3692 of the Political Code, between the third Monday in August and the third Monday in September, apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the State.* If the board shall increase or lower any assessment previously made by it, it must make a statement to the County Auditor of the county affected by the change in the assessment of the change made, and the Auditor must note such change upon the assessment book or roll of the county as directed by the board.

RECORD OF ASSESSMENTS AND APPORTIONMENT.

SEC. 3666. The State Board of Equalization must prepare each year a book, to be called "record of assessment of railways," in which must be entered each assessment made by the board, either in writing, or by both writing and printing. Each assessment so entered must be entered by the chairman and clerk. The record of the apportionment of the assessments made by the board to the counties, and cities and counties, must be made in a separate book, to be called "record of apportionment of railway assessments." In such last described book must be entered the names of the railways assessed by the board, the names of the corporation to which, or the name of the

person or association to whom, each railway was assessed, the whole number of miles of the railway in the State, the number of miles thereof in each county, or city and county, the total assessment of the franchise, roadway, roadbed, rails, and rolling stock for purposes of State taxation, and the amount of the apportionment of such total assessment to each county, and city and county, for county, and city and county, taxation. Before the third Monday of October of each year, the clerk of the State Board of Equalization must prepare and transmit to the controller of State duplicates of the "record of assessment of railways" and "record of apportionment of railway assessments," each certified by the chairman and clerk of the board, and to be known respectively as "duplicate record of assessment of railways" and "duplicate record of apportionment of railway assessments." In the last named duplicate two columns must be added, in one of which the controller must enter the State taxes due the State upon the whole assessment by each corporation, person, or association, and in the other the county, or city and county, taxes due upon the assessment apportioned to each county, or city and county, by each corporation, person, or association. The two duplicates constitute the warrant for the controller to collect the State and county, and city and county, taxes levied upon such property assessed by the board, and the amount of the apportionment of the assessment to each county, and city and county, respectively.

DUPLICATE RECORD.

SEC. 3667. When the Board of Supervisors of each county, and city and county, to which the State Board of Equalization has apportioned the assessment of railways, shall have fixed the rate of county, or city and county, taxation, the clerk of the Board of Supervisors must forthwith, by mail, postage paid, transmit to the controller a statement of the rate of taxation levied by the Board of Supervisors for county, or city and county, taxation. If the clerk fails to transmit such statement, the controller must obtain the information as to such rate of taxation

from other sources. On or before the fourth Monday of October the controller must compute and enter in separate money columns in the "duplicate record of apportionment of railway assessments," the respective sums, in dollars and cents, rejecting fractions of a cent, to be paid by the corporation, person, or association liable therefor, as the State tax upon the total amount of the assessment, and the county, or city and county, tax upon the apportionment of the assessment to each county, and city and county, of the property assessed to such corporation, person, or association named in said duplicate record.

NOTICE OF DELINQENCY.

SEC. 3668. Within ten days after the fourth Monday in October, the controller must publish a notice for two weeks in one daily newspaper of general circulation at the State capital, and in two daily newspapers of general circulation published in the city of San Francisco, specifying:

1. That he has received from the State Board of Equalization the "duplicate record of assessments of railways" and the "duplicate record of apportionment of railway assessments."

2. That the taxes are now payable and will be delinquent on the last Monday in December next, at six o'clock P. M., and that unless paid to the State Treasurer at the capital prior thereto, five per cent. will be added to the amount thereof. *On the last Monday in December of each year, at six o'clock p. m., all unpaid taxes are delinquent, and thereafter there must be collected by the State Treasurer, or other proper officer, an addition of five per centum,* which sum, when collected, must be set aside by the treasurer as a fund with which to pay the contingent expenses of actions against any delinquents, the said expenses to be audited by the Board of Examiners. When any taxes are paid to the State Treasurer by order of the controller, upon assessments made and apportioned by the State Board of Equalization, the controller must forthwith notify the auditor and treasurer respectively of each county, and city and county, that such taxes have been

paid, and of the amount thereof to which each county, and city and county, interested is entitled. The State's portion must be distributed by the treasurer to each fund entitled thereto, and the portion belonging to the counties, and cities and counties, must be placed in a fund, to be called "railway tax fund," to the credit of each county, and city and county, entitled thereto. When any taxes are placed in the "railway tax fund," to the credit of a county, or city and county, the controller at the next settlement with the controller by the treasurer of such county, or city and county, must draw and deliver to such treasurer his warrant upon the State Treasurer for the amount in the fund to the credit of such county, or city and county.

DISSATISFIED OWNERS MAY SUE TREASURER.

SEC. 3669. Each corporation, person, or association assessed by the State Board of Equalization must pay to the State Treasurer, upon the order of the controller, as other moneys are required to be paid into the treasury, the State and county, and city and county, taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person or association dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the five per cent. added, if to be added, on or before the first Monday in February, and the filing of notice with the controller of an intention to begin an action, may, not later than the first Monday of February, bring an action against the State Treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served upon the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days within which to demur or answer. At the time the treasurer demurs or answers he may demand that the action be tried in the Superior Court of the county of Sacramento. The

Attorney-General must defend the action. The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for. If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the controller, he shall draw his warrant upon the State Treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the Board of Examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated, and the controller may demand and receive from the county, or city and county, interested, the proportion of such costs, or may deduct such proportion from any money then or to become due to said county, or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, *and a failure to begin such action is deemed a waiver of the rights of action.*

CONTROLLER TO SUE DELINQUENTS.

SEC. 3670. After the first Monday of February of each year, the Controller must begin an action in the proper Court, in the name of the people of the State of California, to collect the delinquent taxes upon the property assessed by the State Board of Equalization; such suit must be for the taxes due the State, and all the counties, and cities and counties, upon property assessed by the Board of Equalization, and appearing delinquent upon the "duplicate record of apportionment of railway assessments." The demands for State and county, and city and county taxes may be united in one action. In such action a complaint in the following form is sufficient:

[Title of Court.]

The People of the State of California,

vs.

(Naming the defendant).

Plaintiff avers that on the —— day of ——, in the year (naming the year), the State Board of Equalization as-

sessed the franchise, roadway, roadbed, rails and rolling stock of the defendant at the sum of (naming it) dollars. That the Board apportioned said assessment as follows: To the county of (naming it) the sum of (naming it) dollars (and so on, naming each county).

That the defendant is indebted to plaintiff for State and county taxes for the year eighteen ——, in the following sums: For State taxes, in the sum of (naming it) dollars; for county taxes of the county of (naming it), in the sum of (naming it) dollars, etc., with five per cent. added for nonpayment of taxes. Plaintiff demands payment for said several sums, and prays that an attachment may issue in form as prescribed in section five hundred and forty of the Code of Civil Procedure.

(Signed by the Controller or his attorney.)

On the filing of such complaint the clerk must issue the writ of attachment prayed for, and such proceedings shall be had as under writs of attachment issued in civil actions; no bond nor affidavit previous to the issuing of the attachment is required. If in such action the plaintiff recover judgment, *there shall be included in the judgment as counsel fees*, and in case of judgment of taxes, after suit brought, but before judgment, the defendant must pay as counsel fees, *such sum as the Court may determine to be reasonable and just.* Payment of the taxes or the amount of the judgment in the case must be made to the State Treasurer. In such action the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy of them, certified by the Controller, showing unpaid taxes against any corporation, person or association for property assessed by the State Board of Equalization, is *prima facie* evidence of the assessment, the property assessed, the delinquency, the amount of taxes due and unpaid to the State and counties or cities and counties therein named, and that the corporation, person or association is indebted to the people of the State of California, in the amount of taxes, State and county, therein appearing unpaid, and that all the forms

of law in relation to the assessment and levy of such taxes have been complied with.

BASIS OF TAXATION.

SEC. 3671. The assessment made by the county assessor, and that of the State Board of Equalization, as apportioned by the boards of supervisors to each city, town, township, school, road or other district in their respective counties, or cities and counties, shall be the only basis of taxation for the county, or any subdivision thereof, except in incorporated cities and towns, and may also be taken as such basis in incorporated cities and towns, when the proper authorities may so elect. All taxes upon townships, road, school, or other local districts shall be collected in the same manner as county taxes.

Office Supreme Court U. S.
FILED.
JAN 15 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

Nos. 559 and 560.

THE CENTRAL PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Brief by Way of Answer to the Argument for the Defendants in Error.

J. HUBLEY ASHTON,
CHARLES H. TWEED,
of Counsel for Plaintiffs in Error.

McGILL & WALLACE, Law Printers, Washington, D. C.

Supreme Court of the United States.

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PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

THE SOUTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Brief by Way of Answer to the Argument for the Defendants in Error.

I.

The learned counsel for the defendants in error state that, in their opinion, there is but one Federal question properly presented by the records, "namely, whether

or not the granting to these Railroad Companies of what are commonly called their Federal *franchises* operated so as to merge therein their State *franchises* previously granted to them, in such manner as to divest such State *franchises* of *their* property character, and prevent *their* taxation as property by the State."

The question to which the learned counsel refer, and the question discussed in the Brief for the plaintiff in error in No. 559 (pp. 84–98), is not properly stated in this way. Nor is the question referred to the only Federal question presented in the records. We are not dealing with the "Federal *franchises*," and the "State *franchises*," of these Railroad Companies, in general; but what we are concerned with is "*the franchise*" of the "*railroads*," in the meaning and intent of the State Constitution, and of the assessments sought to be enforced in these suits. It is "the franchise" of the "railroads," which, with the "roadway, roadbed, rails, and rolling stock" of the "railroads," the State Board is authorized, by the Constitution, to assess. As this Court said in the cases in 127 U. S., "in regard to a railroad, the State Board has power to assess only *five* things, the *franchise*, *roadway*, *roadbed*, *rails*, and *rolling stock*" (p. 29.)

The proposition, on the part of the plaintiffs in error, has reference to the thing called the franchise *of the railroad;* and it is maintained that that thing is nothing but the *right to operate the railroad;* that this right is single, from how many sources soever derived; and that being derived from the United States, that right can not be taxed by the State, even though the State

had also granted that right to the Pacific Railroad Company. The opinions of the majority and minority of the Court below, in these cases, distinctly recognize the *franchise of the railroad* as the right to operate the particular railroad, substantially as defined in the Brief. (Record, No. 559, pp. 266, 267.)

It is the franchise *of the railroad* whether owned by an individual or a corporation ; and the assessments in question would have been the *same* had the railroads been owned by *individuals*, and not by corporations. Corporate capacity is a franchise, and may be taxed by the State. As soon as a railroad corporation is organized its corporate franchise, its right to be a corporation, may be assessed by the county assessor, but until it owns or operates a railroad it has nothing which the State Board of Equalization can assess. What that Board did assess, in these cases, was, therefore, the right, and the whole of the right, to operate these particular railroads—a right entirely distinct from the corporate capacity, or any *corporate* franchise possessed by the plaintiff in error.

II.

It is said by the defendants in error that the State Court having found as matter of fact that the Federal franchise was not assessed, this Court will not, upon writ of error, review such decision of fact on the evidence.

The proposition, on the part of the plaintiffs in error, is that nothing but an express affirmative finding that the franchise assessed, and upon which the taxes

sought to be recovered were levied, was the franchise "*derived from the State of California*," could warrant judgments for such taxes, even if that franchise, as such, could be assessed to taxation by the State consistently with the Constitution and laws of the United States.

There is no such finding of fact in respect to the particular franchise upon which the taxes were levied, to support the judgments.

The trial Court may or may not have been of opinion that there were no Federal franchises, as such, held by the Companies; but, at any rate, it was for the Court to find whether or not *the particular franchise of the railroad* assessed by the Board, was the franchise which was derived from the State of California.

But in reference to the finding of the State Court referred to, this Court will consider the decisions of the State Courts in regard to the competency, or legal effect, of the evidence offered by the parties, at the trial, which bore directly upon the Federal right claimed, and sought to be maintained, by the plaintiffs in error in these actions. (Mackay *v.* Dillon, 4 How., 447; Burthe *v.* Denis, 133 U. S., 514.)

It is understood that the principle is well settled that when the question decided by the State Court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency or legal effect of evidence as bearing upon a Federal right, or upon a question of Federal law, the decision may be reviewed by this Court, and that the principle is recognized by this Court in the case of *Dower* v. *Richards* (151 U. S., 667) referred to by the defendant in error.

III.

The third point on the part of the defendant in error is this : "Should the finding of the State Court that the Federal franchise was not included, be *reviewed* by this Court, then we invoke the *principle* that the *record judgment* of the State Board of Equalization, fixing the assessment, could not be *impeached by parol*, except for *fraud*, and that no fraud is charged."

As has been said, this is the theory upon which the trial Court tried and decided the case, but the theory is entirely indefensible, and in direct conflict with the doctrine and decision of this Court in *Santa Clara County* v. *Southern Pacific Railroad Company* (118 U. S., 394, 415,) as well as in *Fittsburgh, &c., Railway Co.* v. *Backus* (154 U. S., 421), which is cited, strangely enough, by the learned counsel for the defendant in error, as supporting their proposition.

If such a principle as that maintained by the defendant in error, and applied by the State Court, in these cases, had been sanctioned by this Court, it never would have been possible to correct by judicial action the abuses of power by the State Board of Equalization in respect to the property and rights of these Railroad Companies, in violation of the Constitution of California, and the Constitution of the United States.

In the *Santa Clara County Case*, Mr. Justice Harlan, speaking for the Court, clearly affirmed the principle that *if* there was any *presumption* that the "*record*

judgment" of the Board, as it is called, included only such things as the Board had *jurisdiction* to assess, it could be "overthrown" by parol proof that the Board did, in fact, include in such "record judgment" things which it had no jurisdiction by law to touch.

The case of *Pittsburgh, &c., Railway* v. *Backus*, was a writ of error to a judgment of the Supreme Court of Indiana upon a bill filed by the Company to restrain the collection of taxes upon an assessment under the State law on the double ground that the law was unconstitutional, and that it had been administered so as to create an illegal assessment of the Company's property.

This Court considered and determined upon the evidence the latter question without the expression of any doubt as to the right of the plaintiff to impeach, by parol evidence, the "record judgment" of the State Board not only in respect to the property included in the assessment, but also in respect to the *value* of the property admittedly assessed by the Board.

It was with reference to the question of the "*true cash value* of *the plaintiff's property in Indiana*," which was decided by the Board, that the Court said that its decision created something more than a mere presumption of fact, and could not be overthrown by the testimony of two or three witnesses that the *valuation* was other than that fixed by the Board (154 U. S., 334, 435). The Court was of opinion under the evidence that the Board assessed only the value of that part of the road in Indiana, and that its decision of the question of the value of that property, was not shown by the evidence to be wrong.

IV.

It is said by the defendant in error that "the evidence introduced failed to impeach the record of these assessments, and the finding that the Federal franchise was not assessed is fully sustained by the evidence."

It is maintained on the part of the plaintiffs in error that it was for the State to prove affirmatively in support of its alleged causes of action that the Board assessed only the franchise *derived from the State*, and that the taxes sought to be recovered were levied upon such franchise of the railroads alone. No evidence to prove that fact was adduced by the State in support of its alleged causes of action in these suits.

But the finding of the State Court referred to has and can have no *validity or effect*, as a finding of fact, to support the judgments, because the record, in these cases, shows that the finding was finally made by applying to the cases the erroneous theory maintained here by the defendant in error, that "the *record judgment* of the State Board, fixing the assessment, could not be impeached *by parol*, except for fraud."

The evidence for the plaintiffs in error, tending to show that the Board included their Federal franchise in the assessments, was disregarded, and, in effect, stricken out of the case, by the trial Court, in making this finding.

But even if it should be supposed that the records, in these cases, do not show that the evidence of the plaintiffs in error was disregarded by the trial Court in making

its findings, the records do expressly show that the trial Court refused to allow the plaintiffs in error to introduce testimony which tended to prove that their rights in respect to their Federal franchise had been violated by the illegal inclusion of that franchise in these assessments.

The record plainly shows that the rulings of the trial Court, excluding the testimony of Mr. Morehouse and Mr. Maslin, were based upon the theory, maintained now and here by the defendants in error, that the "record judgment" of the Board was *conclusive* against the plaintiffs in error, and could not be *contradicted* by parol evidence.

These decisions of the State Court are subject to review by this Court.

V.

The fifth proposition, on the part of the defendant in error, relative to the alleged effect of the *statements* of the Railroad Companies, in 1887, under § 3664 of the Political Code, as *estopping* them from maintaining their defense to these suits, is adopted in the opinion of the majority of the Court below.

It is said: "Since the plaintiff in error is estopped by reason of its verified description of its franchise from showing that the assessment, following such description, was ambiguous or *invalid*, the *testimony introduced to impeach such assessment, and the rulings of the Court as to its admission or rejection become immaterial.*"

The problem before the State Supreme Court, as to the mode of supporting these judgments, was ingeni-

ously worked out by the use of this theory of estoppel upon the *statements*, in connection with the "record judgments" of the State Board, in the manner shown by the opinion in the record in *No. 559*. (Record, pp. 267, 268.)

It has been submitted to the learned Court that the plaintiffs in error can not be *estopped by the State Courts out of their right to prove that their Federal franchises were illegally assessed for taxation, and the taxes sought to be recovered were levied upon an illegal assessment* of those franchises, which are means and instrumentalities of the National Government.

VI.

The sixth point in the Brief for the defendant in error is, that the trial Court did not err in admitting the *statements* of the plaintiffs in error for the years 1887 and 1888, in evidence.

It has already been shown that these statements were totally irrelevant to the issue, as to whether the State Board *usurped jurisdiction and power* in respect to the Federal franchises of the railroads, by assessing them for taxation by the State, in 1887, and the taxes sought to be recovered were levied upon the Federal franchises of the Companies, in violation of the Constitution and laws of the United States.

And it has been already shown how the Supreme Court of the State seized upon the statements, and made them the basis of an unwarrantable theory of estoppel, precluding the plaintiffs in error from maintaining, in

these suits, that their Federal franchises were the subject of assessment by the State Board.

The effect given to the statements by the Court below, as destroying the rights of the plaintiffs in error, under the constitutional laws of the country, is absolutely indefensible.

VII.

The seventh point of the defendant in error suggests as another ground of estoppel, that the plaintiffs in error did not "appeal" to the State Board for "correction" of the assessment, in 1887, under § 3665 of the Political Code.

The suggestion in the argument is that the plaintiffs in error "waived all rights to contest the assessments, and *can not be heard* to complain of them *on any ground.*"

The State of California, and its Court, seem to have the happiness of concurring in the view that the plaintiffs in error "*can not be heard*" to say anything in these suits, except to *confess judgments* to the State for the moneys sought to be recovered.

It is manifest that § 3665 of the Political Code has and can have no application to or effect in any case in which the State Board of Equalization has usurped jurisdiction by assessing for taxation by the State, any Federal franchise of these railroads, in violation of the Constitutional laws of the United States.

It is always the right of the Railroad Companies to maintain, in actions by the State to recover taxes levied upon any Federal franchise, that the proceeding of the Assessing Board was a mere nullity, and constitutes

no cause of action or basis for recovery by the State.

The object no doubt of § 3665 was to afford a remedy for mistakes of the Board, in fixing their valuations on property subject to their jurisdiction, and to provide for the correction of such errors.

VIII.

It is next insisted on behalf of the defendant in error that the plaintiffs in error having failed to pay the pretended taxes, and institute actions against the State Treasurer before the first Monday of February, 1888, have under § 3669 of the Political Code, waived all righte to maintain, in these suits, that the State Board assessed franchises of the railroads which they had no power to assess for taxation by the Constitution of the United States.

This suggestion seems not to have been deemed worthy of notice even by the State Court.

IX.

It is said, on behalf of the defendant in error, that the opinion of the trial Court is not a part of the record on the appeal, under the Code of Civil Procedure. The opinion is not, of itself, a part of the record; but, like everything done by the Judge, during the trial, it may be made a part of the record by a bill of exceptions, as in these cases. (See Winans *v.* Cheeney, 55 Cal., 568.)

The Court below, in this case, treated the opinion of the trial Court, in the bill of exceptions, as a part of the record, on appeal, and considered it, in rendering these judgments. (Record, No. 559, pp. 268, 269.)

X.

It has been already submitted, on the part of the plaintiffs in error, that upon no construction or effect that can possibly be given to that opinion of the trial Court, can the findings, in these cases in respect to the assessment of the Federal franchises, be sustained.

XI.

The counsel for the defendant in error, in discussing the question argued by them in regard to the mortgage of the United States on the property and franchises of the Central Pacific Railroad Company, maintain that this mortgage could not be deducted, and state that "if deduction of this security were made, the State would lose entirely the tax on the value of the property to the extent of $16,000 a mile, since the Government mortgage interest could not be taxed." (Brief for Defendant in Error, filed January 4, 1896, pp. 27, 28.)

As we understand the theory suggested, the legal interest of the Government in the property and franchises of the Central Pacific Railroad Company, under the mortgage, while not taxable directly to the United States, is taxable and is taxed by the State, to the Railroad Company.

It can make no difference to whom that interest is taxable, if, as appears, it is, in fact, taxed by the State.

The tax on the franchise of the railroad is a tax on a thing in which the United States, under its mortgage,

has a legal interest and a legal estate, and a thing which alone enables the Company to discharge its obligations to the Government.

The tax can not, therefore, be constitutional.

As we have observed, a mortgage of property, at common law, is a conveyance of the title, and until the debt secured is paid, the title is in the mortgagee.

By the Constitution of California, a mortgage, for the purposes of assessment and taxation, operates in like manner to transfer the mortgagor's interest in the property, to the extent represented by the amount secured, to the mortgagee.

As the legal interest of the United States in the franchise of the railroad is, in fact, taxed by the State, it is immaterial that it is taxed to the Company, and that the taxes upon it are payable by the Company under the law of California.

J. HUBLEY ASHTON,
CHARLES H. TWEED,
Counsel for Plaintiffs in Error

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

CENTRAL PACIFIC R.R. CO.,
PLAINTIFF IN ERROR,
vs.
PEOPLE OF STATE OF CALIFORNIA,
DEFENDANT IN ERROR.
No. 559.

SOUTHERN PACIFIC R.R. CO.,
PLAINTIFF IN ERROR,
vs.
PEOPLE OF STATE OF CALIFORNIA,
DEFENDANT IN ERROR.
No. 560.

REPLY BRIEF OF DEFENDANT IN ERROR.

J. P. LANGHORNE,
JNO. H. MILLER,
Of Counsel for Defendant in Error.

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CENTRAL PACIFIC R.R. CO., PLFF. IN ERROR, v. PEOPLE OF STATE OF CALIFORNIA, DEFT. IN ERROR.	*No* 559.
SOUTHERN PACIFIC R.R. CO., PLFF. IN ERROR, v. PEOPLE OF STATE OF CALIFORNIA, DEFT. IN ERROR.	*No.* 560.

Reply Brief of Defendant in Error.

In preparing the original brief for defendant in error in these cases, heretofore filed, we did not have the benefit of the brief of plaintiff in error, as it had not then been filed, and, not knowing what points plaintiff in error would rely

on, we were compelled to argue all the thirty-five assignments of error contained in the record. Since then plaintiff in error has filed a brief in the Central Pacific case, in which many of the assignments of error argued in our original brief are abandoned, and notably amongst them is the mortgage question, to which a large part of our brief was devoted, and which is expressly abandoned by plaintiff in error at page 35 of his brief. This course on the part of plantiff in error has very materially narrowed the contested matters herein and rendered unnecessary all that portion of our original brief which discusses the now abandoned issues. We file this reply brief for the purpose of placing before the court the present contested matters in a concise and succinct form.

In the brief of plaintiff in error there is practically but one point made, although stated in several different forms, and that point is *the contention that the disputed assessment, on which the taxes sued for are based, included the value of the federal franchise held by plaintiff in error, and is, therefore, void and of no effect.*

Before proceeding to a specific reply on the merits, we desire to repeat certain preliminary objections, urged in our original brief, which we claim are sufficient to dispose of the case before reaching the points urged by plaintiff in error.

Preliminary Objections.

I.

In the first place, we insist that there is no federal question involved, and hence the writ of error should be dismissed.

The trial court found as matter of fact that the value of the federal franchise was NOT included in the assessment.

That was a contested issue. Evidence both *pro* and *con* was introduced thereon. Upon consideration of that evidence the trial court found the fact as stated *supra*, and that finding was affirmed by the State Supreme Court.

Under such circumstances we understand the rule to be that this court is without jurisdiction, because no federal question is involved, but only a question of fact, determinable by the general rules of evidence.

Dower v. *Richards* (151 U. S. 668).
Hall v. *Campan* (3 Wall. 106).
Boggs v. *Mining Co.* (*Id.* 304).
Hall v. *Jordan* (15 Wall. 393).
Crary v. *Devlin* (23 L. C. P. Co. Rep. 511).
Republican River Bridge Co. v. *Kansas Pacific R. R. Co.* (92 U. S. 317).
Israel v. *Arthur* (152 U. S. 355).
Hyde v. *Booraem* (16 Pet. 176).
U. S. v. *King* (7 How. 833).

The reason for this rule is apparent from the most casual inspection of the statute allowing a review by this court of final judgments of the highest court of a State.

In *Israel* v. *Arthur* (152 U. S. 361) the Chief Justice of this court stated the rule in this way:

"It is not sufficient for the maintenance of our jurisdiction to review the judgments of State courts, that a right, title, privilege, or immunity under the Constitution of the United States *may have been claimed*, but such right, title, privilege, or immunity *must have been denied*."

In that case plaintiff in error *claimed* a certain right or privilege under the Constitution of the United States, but the State court found as a fact that by her voluntary acts and conduct she had waived it, and this court said:

"Assuming that plaintiff in error * * * duly set up a right of protection under the Constitution, yet, if she were debarred from asserting property rights in the estate of John Arthur, as his widow, then that right *was not denied* for want of the subject-matter to be protected."

And in closing the decision the Chief Justice, quoting the language of Mr. Justice Gray in *Dower* v. *Richards* (151 U. S. 658), said:

"And it has been often held, at least in actions at law, that this court has no jurisdiction to revise the decision of the highest court of a State upon a pure question of fact, although a federal question might arise if the question of fact were decided in a particular way."

In the cited case of *Dower* v. *Richards* (151 U. S. 659) the question is elaborately discussed, and all the principal cases are cited, from which these conclusions were deduced by this court, viz:

That the only way of reviewing in this court final judgments of the highest court of a State is by writ of error; that the only matters reviewable on writ of error are matters of law, and all matters of fact found by the court must, like the finding of a jury, be regarded as conclusive; that "no point has been more repeatedly and authoritatively settled than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record" (Wayne, J., in U. S. *v.* King, 7 How. 833); and, finally, that on writ of error, in a case like the one at bar, there is no jurisdiction in this court, except where the decision of the State court is against the validity of a right, title, privilege, or immunity claimed under the Constitution or laws of the United States.

In *Boggs* v. *Merced Mining Co.* (3 Wall. 304) the late Chief Justice Waite said:

"There could have been no decision of the court of appeals against the validity of any statute of the United States, because it was found that the facts, upon which the defendants relied to bring their case within the statutes in question, did not exist. *The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation.*" (Quoted in *Dower* v. *Richards*, 151 U. S. 670.)

And in *Republican River Bridge Co.* v. *Kansas Pacific Railway* (92 U. S. 317), the late Mr. Justice Miller, in delivering the opinion of this court, said:

"The finding of the district court was received by the Supreme Court of the State as conclusive as to all facts in issue, and it is equally conclusive upon us. Where a right is set up under an act of Congress in a State court, any *matter of law* found in the record, decided by the highest court of the State, bearing on the right so set up under the act of Congress, can be re-examined here. * * * In cases where the facts are submitted to a jury, and are passed upon by the verdict in a common-law action, this court has the same inability to review those facts in a case coming from a State court that it has in a case coming from a circuit court of the United States. This conclusiveness of the facts found extends to the finding by a State court to whom they have been submitted by waiving a jury, or to a referee, where they are so held by State laws, as well as to the verdict of a jury."

Application of these decisions to the case in hand will demonstrate that this court is without jurisdiction. The case is an action at law, brought to this court by writ of error. The State court decided *as matter of fact that the federal franchise was not included in the assessment.* It did not decide *against the existence or validity* of any right, title, privilege, or immunity held by plaintiff in error under the federal Constitution or acts of Congress. On the con-

trary, the State court held that the plaintiff in error did possess a federal franchise, and that it was not assessable or taxable by the State board. What the State court held was identically what was held in the cited cases of *Boggs* v. *Mining Co.*, *Crary* v. *Devlin*, *Republican River Bridge Co.* v. *Kansas Pacific Railway*, *Dower* v. *Richards*, and many other cases of like import, viz: "That the facts upon which the defendants below relied to bring their case within the statute in question did not exist."

That finding of fact is conclusive on this court, and cannot be reviewed by it. Hence there is no federal question involved, so far as this so-called federal franchise is concerned, and as that is now the only question in the case, all others having been waived and abandoned, the writ of error ought to be dismissed.

We have not heretofore made a formal motion to dismiss the writ of error on the ground above indicated, because we did not know until the plaintiff in error filed its brief in the Central Pacific case (which was done on January 6th, the day set for oral argument of the case) that all questions were abandoned except that of the federal franchise. We now insist that the writ should be dismissed on the ground stated.

If, however, this point be not well taken, then we ininsist:

II.

That the plaintiff in error is estopped from denying the validity of the disputed assessment, because said assessment follows the identical wording of the sworn statement, containing a description of its property, furnished by plaintiff in error to the State Board of Equalization for the purposes of assessment and as being subject to taxation.

By section 3664 of the Political Code of California the plaintiff in error (like other persons in the same class) was required to furnish to and file with the State Board of Equalization a statement in writing, signed and sworn to by one of its officers, describing its property subject to assessment and taxation. (See Appendix 70, our original brief.)

At the proper time the plaintiff in error did furnish to and file with said board the required statement, which contains, *inter alia*, the following averments, under oath, viz:

"The railroad company answers the questions propounded by the board as follows, and makes the following statement in relation to *its property subject to taxation in the State of California*, owned by it for the year ending on the first Monday in March, 1887, and of all properties used in operating its railways during such year. (Here follows detailed description of road, rolling stock, etc.)

The value of THE FRANCHISE and entire roadway, roadbed, and rails within this State is $12,273,785." * * *

Record, C. P. Case, p. 173.

The same kind of statement was also made by the Southern Pacific Railroad Company.

After receiving this statement from the plaintiff in error as to *its property subject to taxation*, the board, *acting on said statement*, proceeded to and did make the assessment *in the identical words of the statement itself*, so far as the franchise is concerned.

Is it possible to conceive that plaintiff in error intended by the use of the words "the franchise * * * within this State subject to taxation," to refer to and designate its federal franchise, a thing which for fifteen years they have been contending is not taxable? On the contrary, is it not manifest that by the expression plaintiff in error intended to and did refer to its State franchise?

But whatever might have been its intention, if there is any ambiguity in the language, the plaintiff in error is alone responsible for it, and is therefore estopped from taking advantage thereof.

A tax-payer in California is bound by, and cannot complain of, an assessment which follows the description furnished the assessor by the tax-payer himself.

People v. *Railroad Co.*, 49 Cal. 420.
City and County v. *Flood*, 64 *id.* 504.
Lake County v. *Mining Co.*, 68 *id.* 14.
Dear v. *Varnum*, 80 *id.* 87.

III.

But if the preceding point be not sufficient, then we insist that plaintiff in error waived its right to contest the assessment by failing to apply to the assessing board for a correction thereof.

Section 3665 of the Political Code provides that, if the owner of a railroad, assessed by the State Board of Equalization, is dissatisfied with the assessment, he has a right to apply to the board at a stated time and place, "to have the same corrected in any particular." (See appendix, original brief, p. 74.)

There is a still further provision for such a contingency, made by section 3669 of the Political Code, which provides that, if a party claims his assessment to be illegal, he must first pay the taxes and then institute a suit against the treasurer for the recovery of said taxes, or the portion thereof claimed to be illegal. The section also provides that, if such suit is not begun on or before the first Monday in February of the year succeeding the year in which the taxes are levied, such failure shall be deemed

a waiver of the right of action. (See appendix, original brief, pp. 77, 78.)

Here we find two provisions of law for the protection of a complaining tax-payer. The first gives him full opportunity to appear before the assessing board and point out wherein the assessment is illegal or unjust, so that the same may be corrected *in any particular*.

If the assessing board refuses to make correction, then the tax-payer has an appeal to the courts, both State and federal, where he can surely get justice done him.

In the case at bar plaintiff in error deliberately refused to avail itself of either of these remedies. Therefore it is estopped from now contesting the validity of the assessment. It does not affirmatively appear from the record that the plaintiff in error did not apply to the board for correction of the assessment under section 3665, quoted; but, as the burden was on plaintiff in error to show that it had made such application without avail, and as it made no such showing, we insist that it will be presumed that it made no such application.

It does affirmatively appear, however, that plaintiff in error did not avail itself of the remedy given by section 3669 of the Political Code, to pay the taxes and then sue for recovery, because such action cannot be brought until the taxes are actually paid, and these taxes have not been paid.

Since then plaintiff in error failed to avail itself of the remedies allowed it by law for correcting the assessment, it cannot now complain. It had an ample remedy, in fact two remedies, for correcting the assessment, if as matter of fact that assessment included the federal franchise.

Those remedies were provided for its protection by the laws of California. One was an appeal to the assessing board; the other, an appeal to the courts.

If the plaintiff in error had gone before the board and shown that the assessment included the federal franchise, or that it was ambiguous in language and liable to be interpreted as including the federal franchise, said assessment would have been then and there corrected by the board, because at that time the circuit court of the United States had decided in the case of *California* v. *Pacific Railroads*, that this federal franchise was not taxable; and in such event there never would have been any question as to the validity of this assessment; and if the board had refused to make the correction, plaintiff in error, by first paying the taxes, could have brought suit in the State court for recovery of the whole of said taxes. And further still, if the State courts refused relief, plaintiff in error could have come to this court by writ of error. Instead of doing that, however, plaintiff in error, having first caused all the trouble and ambiguity in the assessment by its own act in framing the description of its taxable property in the sworn statement which it furnished to the assessing board, refuses to avail itself of the ample remedies furnished by the State law for correcting the assessment, and waits until the State brings suit for the taxes before disclosing any objection to the assessment.

We submit that plaintiff in error cannot now take advantage of such conduct, but is estopped thereby.

The Merits.

Having disposed of these preliminary objections, we come now to the merits and make specific answer to the points advanced by counsel for plaintiff in error.

I.

The first point made is that the California Supreme Court erred in deciding upon the facts as found by the trial

court, that the federal franchise was not included in the assessment, and should have decided that said franchise was included.

We understand this contention to mean that the California court deduced an erroneous *conclusion of law* from the facts as found by the trial court, and *ex necessitate* the argument assumes that said *facts* were correctly found. In other words, no attack is made on the findings of fact, but only on the conclusion of law to be drawn therefrom.

But this argument is *felo-de-se*, because finding of fact XXXV is:

"That in making its assessment and valuation therefor of defendant's franchise, said State Board of Equalization did NOT include, assess, or value any franchise or corporate power held or exercised by defendant under the acts of Congress hereinbefore mentioned, or under any act of Congress whatever. And said board, in making said assessment and valuation therefor, upon defendant's franchise, roadway, roadbed, rails, and rolling stock for purposes of taxation for the fiscal year 1887 did NOT include in its said assessment and valuation therefor any federal franchise then possessed by defendant, nor any franchise or thing whatsoever which said board could not legally include in such assessment or valuation." * * *

The argument of opposing counsel assumes that this finding of fact is correct, and this must necessarily be so, because that finding is not liable to attack in this court, it being settled law that on writ of error to the highest court of a State in an action at law the facts found by the trial court cannot be reviewed, because such review presents no federal question (Dower *v.* Richards, 151 U. S. 659). This being true, what other conclusion of law could the State court have deduced than that the assessment was not invalid as including the federal franchise?

And yet the learned counsel for plaintiff in error, with this incontestable finding of fact staring him in the face, gravely argues that the State court should have concluded as matter of law that the assessment is illegal as including the federal franchise!

The reasoning by which he works out this remarkable result appears to us pure sophistry. Says he, the California constitution authorizes assessment of "*the* franchise, etc., etc., of all *railroads* operated in more than one county, etc." The findings of fact show that in this case the board "did assess as a unit and not separately THE FRANCHISE, etc., etc., of defendant's *railroad*, etc." Now, "*the franchise*" of a railroad, contemplated by the constitution, is "nothing but the right to operate the railroad, including the incidental right to charge and take tolls thereon." Hence the assessment in this case was an assessment on "the right of the company to operate its railroad in the State." But, it is urged, this right to operate the road is a right or franchise which "was conferred upon the company by, and derived by it from, the Government of the United States," and any State assessment of such right and franchise for purposes of taxation is void under the Constitution and laws of the United States.

But this argument is conclusively answered by the California constitution itself.

By section 1, article XIII of that instrument, it is provided that "All property in the State, NOT EXEMPT UNDER THE LAWS OF THE UNITED STATES, shall be taxed in proportion to its value to be ascertained as provided by law. The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, FRANCHISES, and all other matters and things, real, personal and mixed, capable of private ownership, etc., etc."

Therefore, when the subsequent section 10 of that same article XIII of that same constitution provides that "The franchise, etc., etc., of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization, etc., etc.," certainly *federal franchises* are excluded, because they are "exempt under the laws of the United States," and only *State franchises* are included; and when the board assessed the plaintiff in error here *in the identical words of the constitution*, it must be manifest to any reasoning mind that they did not intend to include in the assessment any federal franchise, a thing which by express provision of the constitution is unassessable and untaxable. And to put the matter beyond any peradventure of doubt, the findings of fact herein declare that no federal franchise was included. In other words, "the franchise" mentioned in the assessment is NOT the franchise derived from the United States, but by necessary implication of words is the franchise derived from the State of California.

Under such circumstances we care not what definition be given to the word "franchise." That is immaterial. The material point is that the State granted *something* to the plaintiff in error under the name of *franchise*, and *that something*, whatever it may be and whatever may be its actual value, is assessable and was assessed, and nothing else was assessed under the term *franchise*. The fact that a superior sovereignty, the United States, subsequently granted to plaintiff in error an additional franchise does not render unassessable or untaxable the State franchise, which had theretofore been and still was assessable and taxable.

And here it may not be out of place to consider the rights included under the respective State and federal franchises of plaintiff in error.

By the laws of California plaintiff in error was granted the following rights and privileges:

To have corporate capacity.

To enter upon lands or waters of any person to survey route.

To construct road across, along, or upon any stream, water-course, roadstead, bay, navigable stream, street, avenue, highway, or across any railway, canal, ditch, or flume.

To cross, intersect, join, or unite its railroad with any other railroad at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, and switches.

To condemn and acquire under right of eminent domain, right of way, roadbed, and materials for construction of road.

Right of way for location, construction, and maintenance of their necessary work, and for every adjunct thereto, over any swamp, overflowed, or other public lands of the State not otherwise disposed of or in use.

Right to take from any adjacent lands of the State all materials, such as wood, stone, and earth, which may be convenient or necessary for the original construction of its works.

Right to charge and collect fares and freights.

Cal. Stats., 1861, p. 607.

Turning to the acts of Congress under which the federal franchise of plaintiff in error is claimed, we find that by section 8 of the act of July 1, 1862 (12 U. S. Stats. 489), Congress expressly recognized the Central Pacific Railroad Company of California to be a corporation under the laws of California. In section 10 it was provided that, in case the Union Pacific Company should complete

the railroad to the eastern boundary of California before the Central Pacific should reach that line, then the Union Pacific should construct the road through California *with the consent of said State.* Nowhere in said act, nor in any subsequent act, is there any provision that the franchises derived by the Central Pacific from the State of California were merged in the federal franchise. On the contrary, the corporate capacity and franchises of the Central Pacific derived from the State of California are expressly recognized.

This is equally true of the Southern Pacific Railroad Company.

See 14 U. S. Stats. 292, § 18.
16 U. S. Stats. 573, § 23.

In the last cited act, known as the Texas and Pacific Act, it is expressly provided in section 23 that the right of the Southern Pacific Railroad Company to construct its road *shall be subject to the laws of California.*

From the foregoing statement it is manifest that valuable rights were granted to the railroad by the State of California other than and different from those granted by the acts of Congress, and that those State rights were fully recognized in said acts of Congress as franchises granted by the State. The grant of rights by Congress was but an additional or supplementary grant, which did not wipe out or destroy the State franchise.

Said this court in *California* v. *Pacific Railroads* (127 U. S. 38), referring to the federal franchise: "This important grant, though in part collateral to, was independent of, that made to the company by the State of California."

This of itself is sufficient to show that the California franchise still remained as a subsisting franchise, notwith-

standing the federal grant. If the federal grant affected in any way the State franchise, it could only be in regard to its *value*, not its *life* or *existence*. But the question we are considering is not one of *values;* it is one of *existence in any form*.

The plaintiff in error has always recognized, and still recognizes, the fact that it possesses a subsisting State franchise; for, in its statement furnished to the Board of Equalization for 1888 describing its *property subject to taxation*, it specifies "the franchise derived from the State." The value placed on that franchise in said statement is ridiculously small (only $25); but, as remarked by us *supra*, this is not a question of *value*, but of *existence*. The question of *value* is a question solely for the assessing board, over which this court has no jurisdiction. It is the prerogative of the board to fix that value.

It does not appear what separate value the board did place on the State franchise in the disputed assessment, because they assessed *as a unit the franchise, roadway, roadbed, rails, and rolling stock at an aggregate sum*, although in determining that aggregate sum they considered the *respective* values of those five things and assessed them "in proportion to their values respectively." (See finding XXXV.)

It may be that they valued that franchise at nothing, or at twenty-five dollars, or a million dollars; but one thing is certain: it was not the federal franchise they were valuing, because the findings of fact so declare.

If there are any subsisting rights or privileges under the name *franchise* possessed by plaintiff in error and emanating from the State of California, they are taxable, and the question of their *value* is to be determined by the assessing board. That there are such rights and privileges admits not of a doubt. For proof we have merely

to refer to *California* v. *Pacific R.R. Co.* (127 U. S. 41), where it is held that "corporate capacity is a franchise."

Plaintiff in error still has "corporate capacity," derived from the State of California. Such corporate capacity is a franchise, and as such is taxable property under the California constitution.

But outside of the question of *corporate capacity*, which, we submit, is of itself a complete answer to this writ of error, if we agree with the learned counsel in his definition of the word "franchise" as being but the right to operate the road and take tolls, we still insist that the assessment is good and is not an attempt to assess the federal franchise. It cannot be denied that the State of California originally granted a franchise to operate the railroad, and that such franchise was taxable property. If the subsequent Congressional grant had the effect of creating a federal franchise to operate that road, then, in the most favorable view to the plaintiff in error, it merely rendered the State right subordinate to the federal right. It did not destroy the State right, nor merge it into the federal right. It did not destroy its existence, and as long as there is any existence present, by the California constitution, that is property and must be assessed and taxed.

In whatever form the learned counsel's argument may be put, and he has put it in a multitude of forms, it always resolves itself into the single proposition that the State franchise has been merged into the federal franchise and thereby its life is destroyed and its existence gone, so that an assessment of "*the* franchise" of this railroad *ex industria* means an assessment of the federal franchise.

No authority is cited to uphold this contention, and judging the prodigious industry and learning of counsel by the elaborate brief he has filed, we conclude that, if any such authority does exist, he would have found it. The

contention appears to us purely a metaphysical abstraction originating in an imagination unusually active and prolific.

In the case of *California* v. *Pacific Railways* (127 U. S. 1), so repeatedly cited by opposing counsel, this court's decision as to the federal franchise was based solely on a finding of fact made by the circuit court (p. 35), that the assessment included the full value of ALL *franchises and corporate powers* held and exercised by plaintiff in error. That language necessarily embraces the federal franchise. But we desire to impress upon the court that the findings in the case at bar are far different, although opposing counsel would have the court to understand them as being in the same language. These findings are that "the franchise" was assessed, and that this language did not include "any franchise or corporate power" derived from the United States. A clear distinction between the two assessments is apparent, and we marvel that the learned counsel should consider them the same.

As to whether or not the assessments in these cases included, either as matter of law or fact, the federal franchises, we particularly refer the court to pages 2–25 of our original brief. *

But the best argument that can be made on this subject is that of Mr. Justice Harrison contained in the decision of the California Supreme Court. We take the liberty of here inserting it :

"It is further urged in support of the appeal that the assessment in question is void for the reason that it includes the franchise received by the appellant from the United States, and in support of this contention California *v.* C. P. R.R. Co. (127 U. S. 1) is cited. The appellant originally received from the State of California a franchise to construct and operate its railroad within this State, and subsequently it received from the United States a fran-

*
See also
Central R.R. & B. Co. vs. Georgia, 92 U.S. 665
M. & P. R.R. Co. v. Arizona, 156 U.S. 347

chise to construct and operate a railroad from the Pacific Ocean eastward, and it is contended that the franchise from the State has been 'merged' into that received from the United States. Appellant has not, however, referred us to any authority which holds that the union of the two franchises in the same corporation will operate as a merger of the State franchise, nor has it invoked any principle of law which would authorize us to hold that such merger took place. A license, or the right to exercise a privilege which is derived from one authority, is not necessarily destroyed or merged by procuring a similar license or right from another authority, any more than is a title to real estate merged by buying in a conflicting title, or taking a conveyance for further assurance from the grantor. The Supreme Court of the United States, in discussing the right to assess the federal franchise, said in the foregoing action between these parties, 127 U. S., p. 38: 'This important grant, though in part collateral to, was independent of that made to the company by the State of California.' It must be conceded that the State franchise is independent of the federal franchise to the extent that it is capable of being revoked by the State. What the effect of said revocation would be, or whether it would in any respect impair the appellant's right to operate its road under the federal franchise, need not be considered. So, too, if the United States in its visitatorial power should for any reason recall the franchise which it has conferred upon the appellant, the franchise received by it from the State of California would still remain, and enable it to operate its road. Whether the appellant is operating its road under the franchise derived from the United States or from the State, is immaterial. The right to operate the road is valuable, whether the road is at present operated under the exercise of this right or not. The franchise from the State is still a valid, existing right, and is property which is susceptible of valuation, although its value will depend upon a variety of circumstances. If its exercise is in abeyance while the road is being operated under federal franchise, it is none the less property, although that circumstance may diminish its taxable value.

"The assessment in the present case is upon the 'franchise, roadway, roadbed, rails, and rolling stock,' and the court finds 'that in making its assessment and valuation therefor of defendant's franchise, said State Board of Equalization did not include, assess or value any franchise or corporate power held or exercised by defendant under any act of Congress.' The finding is fully supported by the evidence. The constitution (article XIII, § 10), as well as the statute (Pol. C., § 3665), requires the State Board of Equalization to include in its assessment the franchise of the railroad, and in the present case the property of the appellant which was assessed by the State Board of Equalization is described as 'the franchise, roadway, roadbed, rails, and rolling stock of said company within this State.' We have seen that the State franchise is property susceptible of valuation, and, as the State Board of Equalization is directed to assess the franchise of the appellant, it must be assumed, in the absence of any other evidence than the assessment itself, that the board has acted upon property within its jurisdiction, rather than upon property which it has no power to include in the assessment. Section 3670 makes the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy thereof, *prima facie* evidence of the assessment, and that the forms of law in relation to the assessment and levy of such taxes have been complied with; and, if there were no other evidence than this, the finding of the court would be sustained.

"The appellant, however, under the provisions of section 3664, had furnished to the State Board of Equalization a statement signed by its secretary, as required by that section, in which it had given as property for which it was to be assessed a description of its roadway, and had stated in addition 'the value of the franchise and the entire roadway, roadbed, and rails within this State is $12,273,785.' While the mention by the appellant in the statement furnished by it of property which the State Board of Equalization had no authority to assess would not prevent it from resisting an attempt to enforce

an assessment upon such property, yet, if the property so mentioned in the statement could be assessed, or if, as in the present case, the appellant held two franchises, one of which could be assessed and the other could not, it must be held that the franchise which it included in its statement was the one capable of assessment, and that the appellant ought not to be permitted to say that the other was intended by it, or was included in the assessment. San Francisco *v.* Flood, 64 Cal. 504; Lake County *v.* Mining Co., 68 Cal. 14; Dear *v.* Varnum, 80 Cal. 86. The value given by the appellant in its statement was not conclusive upon the State board. It was only a portion of the information which the board was to obtain in order to exercise its judgment in fixing the amount at which the assessment should be made. If the appellant felt aggrieved by the value placed upon the property as a unit, or as an aggregate of the several items included in its statement, the statute itself afforded the means by which it could obtain relief. There was no error in admitting these statements in evidence. Upon the contention by the appellant that the assessment included the federal franchise, it was competent to show that it had been made in accordance with the statement furnished by it at the request of the State board.

"Other testimony was introduced upon the issue presented by the answer that the assessment included the federal franchise, but at the conclusion of the trial the court made the above findings that no federal franchise had been assessed, and as there was evidence before it in support of this finding, it must be treated here as conclusive, notwithstanding that there was other evidence that might be regarded as raising a conflict therewith."

II.

The second ground for reversal set up by plaintiff in error (p. 99 brief) is the contention that the trial court failed to find *in totidem verbis* that "the franchise," which was assessed, was in fact the franchise "derived from the State of California."

In this behalf it is urged that "there is no finding by the trial court that the assessed franchise was in fact derived from the State and not from the United States" (brief, 100), and that the finding, being in general terms as to "the franchise" of the plaintiff in error, is broad enough in language to include the federal franchise, and hence the assessment is void.

This argument is based on a consideration of finding XXX alone, without reference to any other finding; but by referring to finding XXXV it will be seen that the court found in express terms "that in making its assessment and valuation therefor of defendant's franchise said State Board of Equalization DID NOT include, assess, or value any franchise or corporate power held or exercised by defendant under the acts of Congress hereinbefore mentioned, or under any act of Congress whatever. And said board, in making said assessment and valuation thereof upon defendant's franchise, roadway, road-bed, rails, and rolling stock for purposes of taxation for the fiscal year 1887, did not include in said assessment and valuation therefor any federal franchise then possessed by defendant; nor any franchise or thing whatsoever which said board could not legally include in such assessment or valuation" (Rec., p. 142).

In other words, the court first found by finding XXX that "the franchise" of the railroad was assessed, following the wording of the constitution and the language of the railroad's sworn statement, and afterwards, by finding XXXV, it found that the franchise which was assessed *was not the federal franchise.*

It requires a more technical and metaphysical mind than we possess to discover any obscurity or lack of clearness in expressing the idea sought to be conveyed by these two findings when taken together. What necessity was there

for making an additional finding, declaring in express words that the franchise, which was assessed, was "the franchise derived from the State"? We see none, and the learned counsel has advanced none. Indeed this criticism appears purely captious. The only ground of complaint he urges against the assessment is that his federal franchise was included in it, and when the trial court found as a fact that said federal franchise was not so included, that ended the matter. The additional finding suggested would have been immaterial.

But in any event the objection urged goes merely to the form of the findings, and that is no federal question.

III.

The third error set up in the brief (page 101) is an allegation that the court erred in deciding that *the State of California has the power to tax a part of "the franchise" of plaintiff in error upon a claim that the part taxed was derived from the State.*

This point is nothing more than a repetition in another form of the first point in the brief already considered, and perhaps does not need any further answer. However, we add a word.

The argument advanced assumes a merger of the State franchise into the federal franchise; but such assumption is entirely unfounded. The two franchises are separate and distinct. The board assessed the one granted by the State and excluded the one granted by the United States.

This was not an assessment of "a part of a franchise," but an assessment of one of two franchises.

In this connection it is further urged that when Congress selected this State corporation as an agency for carrying out certain national objects, it did not intend that

its State franchise should be taxed by the State, and hence *even this State franchise is not taxable.*

The reason urged for this remarkable contention is the assertion that taxation of the State franchise, followed by sale thereof for delinquency in payment of the taxes, would interfere with the operations of the road and hinder and impede performance of the purposes for which its federal franchise was granted.

But this is an erroneous view. Even if this State franchise were sold on execution, or revoked or recalled by the State, or totally destroyed in any way whatever, the plaintiff in error would still have its federal franchise, which is sufficient to enable it to carry out all the purposes mentioned in the acts of Congress. The two franchises are separate and independent, and the life of one is in no way dependent on that of the other. A tax on one is not a tax on the other.

At page 102 of his brief counsel says: "No argument is needed to prove that a tax upon the so-called State franchise of this railroad, in the meaning of the term 'franchise,' as used in the constitution of California, is to all legal intents and purposes a tax on the franchise conferred by the United States, and a tax on a power derived by the company from the United States."

And again, at page 103: "There can be no just doubt that a tax purporting to be imposed upon the State franchise is a direct burden upon the franchise derived from the United States, whether or not it is a tax *upon* that franchise."

And again, at page 103: "Any State tax on the so-called State franchise is of necessity, in its effect, an abridgment of and a crippling burden on the federal franchise."

We take direct issue with each of these assertions. We

deny them *in toto*. We insist that a tax on the State franchise is not a tax on the federal franchise; that a tax on the State franchise is not a *burden on the federal franchise*, nor *an abridgment* of nor *crippling burden* on the same. On the contrary, the State franchise may be taxed by the State, recalled or revoked, or even destroyed utterly, without affecting the federal franchise in any way or preventing the plaintiff in error from operating its road under its federal franchise or from carrying out any of the purposes contemplated by the acts of Congress.

The argument of Mr. Justice Harrison on this point seems to us unanswerable.

IV.

The fourth point made in counsel's brief is the contention that *the United States has a proprietary interest in the State franchise, by virtue of the fact that it has a mortgage on all the properties of plaintiff in error, and therefore said State franchise cannot be taxed.*

This point is mildly suggested by counsel in the form of a query. It does not appear to be seriously urged by him, and is so manifestly unsound that we must decline to argue it.

We say *passim*, however, that it was not raised in nor passed on by the California supreme court, nor is it covered by any assignment of error on this writ of error. For that reason alone it could not be considered.

V.

The fifth point made is the contention *that the assessment is void because it does not show on its face that the franchise assessed was the State franchise, and not the federal franchise.*

The argument on this point is apparently identical with that made in support of the second point, already considered. What occult purpose the learned counsel may have in thus repeating his arguments, we know not. We certainly shall not repeat our answer to them.

We will say, however, of this point what we said of the preceding one,—that it was not raised nor passed on in the California court, nor is it the subject-matter of any assignment of error in this court.

VI.

The sixth and seventh points made by counsel have been considered by us in our original brief, and we do not deem any further notice thereof necessary.

VII.

The eighth point made by counsel merely goes to the weight of the evidence introduced in the trial court. But clearly that is no federal question. The findings of fact are conclusive on that point in this court, and they were likewise conclusive in the California Supreme Court.

In *Butler* v. *Reay* (95 Cal. 214), it was said: "It has been held in more than a hundred cases, commencing with *Payne* v. *Jacobs* (1 Cal. 39), in the first published book of reports of this court, and ending with *Dobinson* v. *McDonald* (92 Cal. 33), in the last volume of such reports, that the finding of a jury or a court as to a fact decided on the weight of evidence will not be reviewed by this court."

VIII.

The ninth error alleged is the assertion that *the trial court prohibited plaintiff in error from proving that the assessment in question included the federal franchise.*

Our answer is that the trial court did nothing of the kind. It gave plaintiff in error full and ample opportunity to prove the alleged fact, and plaintiff in error did introduce evidence on that issue. After the evidence was all in, the court found as a fact that it was insufficient to show that the federal franchise was included, and that ends the matter, so far this court is concerned.

IX.

The tenth, eleventh, twelfth, and thirteenth points made by counsel relate to the exclusion by the trial court of certain matters of evidence, which it deemed incompetent and irrelevant. Those points are sufficiently covered in our original brief (pp. 59, 60, 61, 62, 63, 64, 65).

X.

In his brief in the Southern Pacific case (advance proofs of which have been submitted to us, though the brief itself has not yet been filed), counsel makes the additional point *that the taxation by California of the State franchise of plaintiff in error is a tax upon interstate commerce carried on by plaintiff in error, and hence void.*

There are several answers to this contention, any one of which is sufficient to dispose of it.

First. This defence and point was neither set up in the answers of either of the railroad companies, nor brought to the attention of nor passed upon by the California courts; nor is it assigned as error in the assignments of error in either of these cases. Consequently such point cannot be considered by this court.

Second. As to the authorities cited by counsel.

In Moran *v.* New Orleans (112 U. S. 96) the license tax

by the city of New Orleans upon vessels engaged in interstate commerce under license from the United States was declared void on the ground that it was unconstitutional regulation of commerce between the States, because it was provided that, unless the license be paid, the vessel should not operate under its license from the United States, but should be enjoined from such operation by judicial process. In the language of the court (p. 75), "the conflict between the two authorities is direct and express."

In Gloucester Ferry Co. *v.* Penn. (114 U. S. 196) the Ferry Company had no property of any kind in Pennsylvania, and only landed passengers and property at the wharf in Philadelphia. The State tax levied by Pennsylvania upon the alleged "business" conducted by the company in that State was declared void as a regulation of interstate commerce. An examination of the able opinion of Mr. Justice Field in this case shows that a State tax to be void on such ground must be a direct and intentional burden upon and regulation of the *business of transportation between the States*, and that the State can, for instance, in the case of an interstate ferry, levy such taxes as may be imposed "by way of compensation for the use of the property employed, or *for facilities afforded for its use*, or as ordinary *taxes upon the value of the property*" (p. 217).

In Fargo *v.* Michigan (121 U. S. 230) the taxation by Michigan of the gross receipts of a foreign express company, derived from its business of transporting freight from Michigan to other States, and from other States to that State, was declared a void regulation of interstate commerce. The decision in this case is based mainly upon the fact that there exists a distinction between the right of a State to tax the gross receipts or franchises of a transportation company incorporated by or in the State levying the tax, and its right to levy such tax upon a foreign cor-

poration. This distinction is fully shown at pp. 242–243 of the decision, and the case of State tax on railway gross receipts (15 Wall. 284) is cited in support thereof. In the cases at bar, both corporations being incorporated under the laws of California, the case last cited and the distinction drawn by the court in the Fargo-Michigan case would seem to effectually dispose of counsel's argument on this point. In this connection, we refer to the case of W. U. T. Co. *v.* Mass. (125 U. S. 530), cited in our original brief, where the telegraph company set up the defence that the taxation by Massachusetts of its franchise was a regulation of interstate commerce (p. 538). This court, however, held that the State had a right to tax the property and business of the company within the State.

Third. As to the facts. There is nothing in the record to show that the tax upon the State franchise included a tax upon the interstate commerce of plaintiff in error. On the contrary, the only evidence in the record is that of State Comptroller Dunn, who testified that the property and earnings of the railroad without the State of California were considered only in comparison with its properties, business, and earnings within the State, in an endeavor to arrive at a correct valuation of its properties within the State for purposes of taxation, which brings these cases directly within the authority of W. U. T. Co. *v.* Mass., before cited. (*Record*, pp. 221–223.) It furthermore appears that the assessment of each of these railroads followed the description of their franchises furnished by the companies themselves to the assessing State board for purposes of taxation, and "*as subject to taxation*" in the State of California. (*Record*, p. 173, p. 148.)

All of which is respectfully submitted.

J. P. LANGHORNE,
JOHN H. MILLER,
For Defendant in Error

162 US 167

TRANSCRIPT OF RECORD.

162-167

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 560.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED MARCH 15, 1895.

(15,832.)

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1 & 2 In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	No. 15601 in Supreme Court.
vs.	
SOUTHERN PACIFIC RAILROAD COMPANY, Defendant and Appellant.	No. 28425 in Court Below.

Transcript on Appeal.

Appeal from the superior court of the State of California in and for the city and county of San Francisco, department No. 4, Hon. J. C. B. Hebbard, judge.

H. S. Brown, Foshay Walker, and J. E. Foulds, attorneys for appellant.

Langhorne & Miller, attorneys for respondent.

Filed this 5th day of January, 1894.

L. H. BROWN, *Clerk*,
By GEO. A. McCALVY,
Deputy Clerk.

3 In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	No. — in Supreme Court.
vs.	
SOUTHERN PACIFIC RAILROAD COMPANY, Defendant and Appellant.	No. 28425 in Court Below.

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H. S. Brown, Foshay Walker, and J. E. Foulds, attorneys for appellant.

Langhorne & Miller, attorneys for respondent.

4 *Amended Complaint.*

On the 2nd day of January, 1891, plaintiff filed herein its amended complaint as follows:

(Title of Court and Cause.)

Plaintiff, as of course, files this amended complaint, and for a first cause of action avers:

I. That the defendant is and was at all times herein mentioned a corporation organized and existing under the laws of the State of California engaged in operating a railroad in more than one county in said State.

II. That on the thirteenth day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: Locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking cars, 13; baggage, express and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand, and section cars, and all other kinds of cars, 297; total number of miles of railway in said State, 1,022.33; franchise, roadway, road-bed and rails within said State, as follows:

Beginning at Huron, in Fresno county; thence running in a northeasterly direction to a point in the southwest quarter of section 4, township 19 south, range 20 east, Mt. Diablo base and meridian, on the southeast line of Fresno county; right of way 100 feet wide, being 17.43 miles in Fresno county.

Beginning at the point of intersection of south line of Tulare county with north line of northeast quarter of northwest quarter of section 2, township 25 south, range 25 east, Mt. Diablo base and meridian; running thence southerly through Delano and Poso to Lerdo station; thence southeasterly through Sumner and Pampa to Caliente; thence through Tehachapi pass and the "Loop" to a point in section 26, township 32 south, range 35 east, Mt. Diablo base and meridian; thence south to Mojave; thence south to a point in southwest quarter of southeast quarter of section 33, township 9 north, range 12 west, San Bernardino base and meridian, which point is on the southerly line of Kern county; right of way 100 feet, being a distance of 117.83 miles in Kern county; also, beginning at Mojave, in Kern county, in township 11 north, range 12 west, running easterly through township 11, ranges 12, 11, 10, 9, 8, 7 west, to a point on west line San Bernardino county, in northeast quarter of northwest quarter section 4, township 10 north, range 7 west; townships and ranges of San Bernardino base and meridian; right of way 100 feet wide, being 35.64 miles in Kern county, making a total distance of 153.47 miles in Kern county.

Beginning at the intersection of the north line of the northwest quarter of northeast quarter of section 4, township 8 north, range 12 west, with northerly line of Los Angeles county; thence running south to a point in section 8, township 5 north, range 11 west; thence southwest to Soledad pass; thence west through Soledad pass to Newhall; thence southeasterly to San Fernando, to depot in

city of Los Angeles; thence easterly to a point on the east line of the county, in the northeast quarter of northeast quarter of section 28, township 1 south, range 8 west, San Bernardino base and meridian; again, beginning at a point in city of Los Angeles, near depot; running thence south through Florence to Wilmington; thence skirting west side of San Pedro bay to depot at Fayal; right of way for 115 miles, 100 feet wide; for 21 miles, 50 feet wide; through public thoroughfares, 6.48 miles long, being a distance of 142.48 miles in Los Angeles county.

7 Beginning at a point in northeast quarter of section 16, township 12 south, range 3 east, being on the easterly line of Monterey county, about 400 yards easterly from Sandcut station; thence running westerly to Pajaro station; thence southerly to a point on north bank of Elkhorn slough, near center of section 28, township 12 south, range 2 east; thence following general course of east bank of the slough to southwest corner section 10, township 13 south, range 2 east; thence southerly through Castroville and Salinas city to point in center of section 3, township 17 south, range 5 east; thence southeasterly to depot at Soledad; thence southeasterly, along east bank of Salinas river, to north line of township 18 south, range 7 east; thence southeasterly, following the general meanderings of said river, and across said township and township 19 south, range 7 east; thence across townships 19 and 20, range 8 east; thence across townships 20 and 21 south, range 9 east; thence across townships 21 and 22 and 23 south, range 10 east; thence easterly and southeasterly, along the Salinas river, in township 24 south, range 11 east, crossing the Salinas river in section 26, township 24 south, range 11 east; thence southerly to section 1, township 25 south, range 11 east, being the south line of Monterey county; townships and ranges of Mt. Diablo base and meridian; right of way 100 feet wide, being a distance of 109.14 miles in Monterey county.

8 Beginning at a point in center of railroad bridge crossing Pajaro river, near center of north line of section 10, township 12 south, range 3 east; thence westerly to a point about 400 yards east of Sandcut station, a distance of 2.25 miles; again, beginning at a point near the center of northeast quarter of northeast quarter of section 27, township 11 south, range 4 east, near the center of railroad bridge crossing Pajaro river; running southeasterly in a direct line to depot in town of Hollister; thence in same direction to Tres Pinos, a distance of 15.40 miles; townships and ranges Mt. Diablo base and meridian; right of way 100 feet wide, being a distance of 17.65 miles in San Benito county.

Beginning at a point on east line of Los Angeles county where the east line of the county intersects the northeast quarter of northeast quarter of section 28, township 1 south, range 8 west; running thence east, through township 1 south, ranges 7, 6, 5 and 4 west, to Mound City station; thence southeasterly through San Gorgonio pass to a point on north line of San Diego county, intersected by northeast quarter of southwest quarter section 9, township 3 south, range 1 east; also, beginning at a point on north line of San Diego

county, in southwest quarter of northeast quarter section 11, township 3 south, range 1 east; thence running east to a point on said north line of San Diego county, in southeast quarter of northwest quarter of section 7, township 3 south, range 2 east; townships and ranges being San Bernardino base and meridian; right of way 100 feet wide, being a distance on this division of 54.50 miles in San Bernardino county; also, beginning at a point on east line of Kern county, in northeast quarter of southwest quarter of section 9 4, township 10 north, range 7 west; thence in a general easterly and southeasterly direction through Cramer, Daggett and Haslett to a point in southwest quarter section 3, township 7 north, range 7 east; thence continuing in same general course through Ludlow and Aubrey to center of Colorado river, at Needles; townships and ranges San Bernardino base and meridian; right of way 100 feet wide, being in this division 206.87 miles in San Bernardino county, making a total distance of 261.47 miles in San Bernardino county.

Beginning at a point on the north line of San Diego county, in the northeast quarter of southwest quarter of section 9, township 3 south, range 1 east; thence easterly, curving southerly, to a point on the north line of the county, in the southwest quarter of northwest quarter of section 11, township 3 south, range 1 east; again, beginning at a point on the north line of the county, in southeast quarter of northwest quarter of section 7, township 3 south, range 2 east; thence running southeasterly, through Indio, Seven Palms and Palm Creek station, to center of bridge across Colorado river, in southwest quarter of southeast quarter section 26, township 16 south, range 22 east; townships and ranges San Bernardino base and meridian; right of way 100 feet, being 158.85 miles in San Diego county.

Beginning at depot in 100-vara lot 165 E., corner Fourth and Townsend streets, running southwesterly across Fourth street into Townsend street; thence southwesterly along Townsend 10 street to northwest corner of North Potrero block 133; thence westerly, across said corner and through North Potrero blocks 99, 98, 69, 68, 45 and 44, to east line of block 23; thence southwesterly, through blocks 23, 21, 22, 7 and 6, to line of Harrison street where it intersects Sixteenth street; thence south and along Harrison street to its intersection of Twenty-second street; thence southwesterly, through blocks 139, 153, 154, 171, 170, 184, to west line of San Jose avenue; thence same direction, through portions of blocks 6, 32, 33, 34, 57, 56, 55 and 54, to south line of Twenty-ninth street; thence southerly, through blocks 53, 52 and 29, to south line of Randall street where it intersects the old San Jose road; thence along the road southerly through San Miguel rancho to north line of Ocean House road; thence southerly through San Miguel to block 2, West End Homestead; thence southwesterly to Railroad avenue; thence along the avenue westerly to Rancho Laguna de la Merced; thence continuing southwesterly to a point on north line of section 1, township 3 south, range 6 west, Mt. Diablo base and meridian, said point being near center of said line, and intersected

by the south line of the city and county of San Francisco; right of way, except through public thoroughfares, averaging 30 feet wide, being 7.36 miles in the city and county of San Francisco.

Beginning on the north line of the northeast quarter of northeast quarter of section 1, township 25 south, range 11 east;
11 thence running easterly into and across section 6 and across section 8 to the town of San Miguel, in section 17; thence through San Miguel southerly to the center line of section 29, in southeast quarter of northeast quarter of said section, township 25 south, range 12 east, all of Mt. Diablo base and meridian; right of way 100 feet wide, being a distance of 5.45 miles in San Luis Obispo county.

Beginning on the north boundary of San Mateo county, on the north line of section 1, township 3 south, range 6 west, near the center of the line, Mt. Diablo base and meridian; thence running southeasterly, through the towns of San Bruno, San Mateo and Redwood City, to a point on San Francisquito creek, near the southeast corner of section 34, township 5 south, range 3 west, said base and meridian being the south line of the county, with right of way averaging 60 feet, being a distance of 25.10 miles in San Mateo county.

Beginning at a point on the northwesterly boundary of Santa Clara county, in the middle of the bridge across San Francisquito creek, near the southeast corner of section 34, township 5 south, range 3 west; thence running southeasterly, through the towns of Mayfield, Mountain View and Santa Clara, to westerly line of city of San José; thence running east to depot in San José; thence to Fourth street; thence with Fourth street to southeast line of city; thence southeasterly to town of Gilroy; thence in same course to Carnadero; thence south to point near the north bank of
12 Pajaro river, in southeast quarter of section 5, township 12 south, range 4 east; thence west with the river to east line of Santa Cruz county; again, beginning at Carnadero station aforesaid, and running southeasterly to a point near the center of northeast quarter of southeast quarter section 27, township 11 south, range 4 east, said point being on southeast line of the county, townships and ranges of Mt. Diablo base and meridian; right of way for 18 miles, averaging 60 feet wide; and for 40 miles, 100 feet wide; 1.30 miles in public thoroughfares, being a distance of 59.30 miles in Santa Clara county.

Beginning at a point on the east line of Santa Cruz county, near a point where the southeast corner intersects the Pajaro river; running thence westerly with said river to center of railroad bridge crossing the said river, with right of way 100 feet wide, being a distance of 2.15 miles in Santa Cruz county.

Beginning at a point of intersection of the southwest quarter of southwest quarter of section 4, township 19 south, range 20 east, with the northwest line of Tulare county; thence running easterly, through the towns of Hanford and Lemoore, to the intersection of Central Pacific and Southern Pacific tracks at Goshen; thence continuing southeasterly, through township 19 south, range 24 east, to town of Tulare; thence southerly through Tipton to intersection of

north line of Kern county with south line of southeast quarter of southeast quarter of section 34, township 24 south, range 25
13 east, townships and ranges Mt. Diablo base and meridian; right of way 100 feet wide, being a distance of 62.48 miles in Tulare county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant to the counties in said State in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amounts of said total assessment so apportioned by said board to said counties respectively, and the number of miles of defendant's railway laid in said counties respectively, were as follows, to wit:

To county of Fresno, $281,313. Railway laid therein, 17.43 miles.

To county of Kern, $2,476,945. Railway laid therein, 153.47 miles.

To county of Los Angeles, $2,299,571. Railway laid therein, 142.48 miles.

To county of Monterey, $1,761,476. Railway laid therein, 109.14 miles.

To county of San Benita, $284,864. Railway laid therein, 17.65 miles.

To county of San Bernardino, $4,220,022. Railway laid therein, 261.47 miles.

To county of San Diego, $2,563,776. Railway laid therein, 158.85 miles.

To city and county of San Francisco, $118,788. Railway laid therein, 7.36 miles.

To county of San Luis Obispo, $87,961. Railway laid therein, 5.45 miles.

14 To county of San Mateo, $405,104. Railway laid therein, 25.10 miles.

To county of Santa Clara, $957,078. Railway laid therein, 59.30 miles.

To county of Santa Cruz, $34,700. Railway laid therein, 2.15 miles.

To county of Tulare, $1,008,402. Railway laid therein, 62.48 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to each of the county auditors of said counties a statement showing the length of the main track of defendant's railway within the counties of said auditors respectively, with a description of the whole of defendant's railway track within the counties of said auditors respectively, including the right of way sufficient for identification, the assessed value per mile of the same as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, road-bed, rails and rolling stock of defendant's railway in said State, and the amount apportioned to the counties

of said auditors respectively; and said descriptions in said statements of defendant's railway track, including its right of way in said counties respectively were the same respectively as those hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of each of said counties did enter said statement so transmitted to him upon the assessment-roll
15 of his county, and did enter upon said assessment-roll of his county the said amount of said assessment apportioned by said State board of equalization to his county in the column of the assessment-roll of his county which showed the total value of all property of his county for taxation; and thereafter, and on the first Monday in October, 1887, the board of supervisors of each of said counties did make and cause to be entered in the proper record books respectively an order stating and declaring the length of main track of defendant's railway assessed by said State board of equalization within their respective counties; also the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in their respective counties, and as fixed by said State board of equalization.

VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of each of said counties did levy the State tax of said State of California according to the rate theretofore fixed for such State tax for the fiscal year ending June 30, 1888, by said State board of equalization, upon the taxable property in its county, including the property of defendant assessed and apportioned to its county as aforesaid; and the taxes so levied in all of said counties for the purposes of State taxation upon said property of defendant, assessed and apportioned to said counties as aforesaid, was the sum of $100,320.00.

16 VIII. That upon the seventeenth day of September, 1887, said State board of equalization did fix the rate of State taxation for the fiscal year ending June 30, 1888, at the rate of $0.608 on each one hundred dollars.

IX. That defendant has never at any time paid said State tax, amounting to said sum of $100,320.00, nor any part thereof. That said State tax became and was delinquent on the last Monday in December, 1887, at six o'clock p. m., and upon and at the time of and by reason of such delinquency five per cent. of said State tax, to wit, the sum of $5,015.00, was, by the controller of said State, added to said State tax, and no part of said $5,015.00 so added for delinquency has ever been paid by defendant.

X. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the controller of said State a duplicate record of assessment of railways, and a duplicate record of apportionment of railway assessments, for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property to the said counties.

Before the fourth Monday of October, 1887, said controller did compute, at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record
17 of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of railway assessments, and that the said taxes were then due and payable and would become delinquent on the last Monday in December, 1887, at 6 o'clock p. m., and that, unless paid to the State treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof.

That a reasonable compensation for legal services by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

Plaintiff further complains of defendant, and for a second cause of action avers:

18 I. That defendant is and was at all times herein mentioned a corporation organized and existing under the laws of the State of California, engaged in operating a railroad in more than one county in said State.

II. That on the thirteenth day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking cars, 13; baggage, express and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand and section cars, and all other kinds of cars, 297; total number of miles of railway in said State, 1,022.33 miles; franchise, roadway, road-bed,

and rails within said State the same as hereinbefore de-
19 scribed in the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed, and rails, so far as the same pertain to and were within the county of Fresno, in said State, were as follows, to wit:

Beginning at Huron, in Fresno county; thence running in a northeasterly direction to a point in the southwest quarter of section 4, township 19 south, range 20 east, Mt. Diablo base and meridian, on the southeast line of Fresno county; right of way 100 feet wide, being 17.43 miles in Fresno county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total assessment of the franchise, roadway, road-bed, rails, and rolling stock of defendant to the counties in said State in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the county of Fresno was the sum of $281,313; and the number of miles of defendant's railway laid in said county of Fresno, and so assessed, were 17.43 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county auditor of said county of Fresno a statement showing the length of the main track of defendant's railway within said county, with
20 a description of the whole of the defendant's railway track within said county, including the right of way sufficient for identification; the assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, road-bed, rails, and rolling stock of defendant's railway in said State, and the amount apportioned to said county of Fresno; and said description in said statement of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter upon said assessment-roll of said county the said amount of said assessment apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation. Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track, and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

21 VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including

the property of defendant, assessed and apportioned to said county as aforesaid; and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant, assessed and apportioned to said county as aforesaid, was the sum of $2,959.41.

VIII. That defendant has never at any time paid said tax, amounting to said sum of $2,959.41, nor any part thereof; that said tax became and was delinquent on the last Monday in December, 1887, at six o'clock p. m., and upon and at the time of and by reason of such delinquency five per cent. of said tax, to wit, the sum of $147.97, was by the controller of said State added to said tax, and no part of said $147.97 so added for delinquency has ever been paid by defendant.

IX. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's
22 said property, and the said apportionment of the assessment of defendant's property to the county of Fresno.

Before the fourth Monday of October, 1887, said controller did compute, at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of railway assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at 6 o'clock p. m., and that, unless paid to the State treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof.

That a reasonable compensation for legal services by Langhorne & Miller, attorneys for plaintiff, in the institution and prose-
23 cution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

Plaintiff further complains of defendant, and for a 3rd cause of action avers:

I. That defendant is and was at all times herein mentioned a corporation organized and existing under the laws of the State of

California, engaged in operating a railroad in more than one county in said State.

II. That on the thirteenth day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking
24 cars, 13; baggage, express, and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand and section cars, and all other kinds of cars, 297; total number of miles of railway in said State, 1,022.33 miles; franchise, roadway, road-bed, and rails within said State the same as hereinbefore described in the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed, and rails, so far as the same pertained to and were within the county of Kern, in said State, were as follows, to wit:

Beginning at the point of intersection of south line of Tulare county with north line of northeast quarter of northwest quarter of section 2, township 25 south, range 25 east, Mt. Diablo base and meridian; running thence southerly through Delano and Poso to Lerdo station; thence southeasterly through Sumner and Pampa to Caliente; thence through Tehachapi pass and the "Loop" to a point in section 26, township 32 south, range 35 east, Mt. Diablo base and meridian; thence south to Mojave; thence south to a point in southwest quarter of southeast quarter of section 33, township 9 north, range 12 west, San Bernardino base and meridian, which point is on the southerly line of Kern county; right of way 100 feet, being a distance of 117.83 miles in Kern county; also, beginning at Mojave in Kern county, in township 11 north, range 12 west, running easterly through township 11, ranges 12, 11,
25 10, 9, 8, 7 west, to a point on the west line San Bernardino county, in northeast quarter of northwest quarter section 4, township 10 north, range 7 west; townships and ranges of San Bernardino base and meridian; right of way 100 feet wide, being 35.64 miles in Kern county, making a total distance of 153.47 miles in Kern county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant to the counties in said State in which defend-

ant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the county of Kern was the sum of $2,476,945; and the number of miles of defendant's railway laid in said county of Kern, and so assessed, were 153.47 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county auditor of said county of Kern a statement showing the length of the main track of defendant's railway within said county, with a description of the whole of the defendant's railway track within said county, including the right of way sufficient for identification, the assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise,
26 roadway, road-bed, rails and rolling stock of defendant's railway in said State, and the amount apportioned to said county of Kern; and said description in said statement of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter upon said assessment-roll of said county the said amount of said assessment apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation. Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track, and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the prop-
27 erty of defendant, assessed and apportioned to said county as aforesaid; and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant, assessed and apportioned to said county as aforesaid, was the sum of $34,479.07.

VIII. That defendant has never at any time paid said tax amounting to said sum of $34,479.07, nor any part thereof; that said tax became and was delinquent on the last Monday in December, 1887, at six o'clock p. m., and upon and at the time of and by reason of such delinquency five per cent. of said tax, to wit, the sum of $1,723.95, was, by the controller of said State, added to said tax, and no part of said $1,723.95 so added for delinquency has ever been paid by defendant.

IX. That prior to the third Monday of October, 1887, the said

State board of equalization did prepare and transmit to the controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property, to the county of Kern.

Before the fourth Monday of October, 1887, said controller
28 did compute at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State capitol of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of railway assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at 6 o'clock p. m., and that, unless paid to the State treasurer at the capital prior thereto, five per cent. would be added to the amount thereof.

That a reasonable compensation for legal services by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

29 Plaintiff further complains of defendant, and for a 4th cause of action avers:

I. That defendant is and was, at all times herein mentioned, a corporation organized and existing under the laws of the State of California, engaged in operating a railroad in more than one county in said State.

II. That on the thirteenth day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the

Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking cars, 13; baggage, express and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand and section cars, and all other kinds of cars, 297; total number of miles of rail-
30 way in said State, 1,022.33 miles; franchise, roadway, road-bed and rails within said State, the same as hereinbefore described in the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed and rails, so far as the same pertained to and were within the county of Los Angeles, in said State, were as follows, to wit:

Beginning at the intersection of the north line of the northwest quarter of northeast quarter of section 4, township 8 north, range 12 west, with northerly line of Los Angeles county; thence running south to a point in section 8, township 5 north, range 11 west; thence southwest to Soledad pass; thence west through Soledad pass to Newhall; thence southeasterly to San Fernando, to depot in city of Los Angeles; thence easterly to a point on the east line of the county, in the northeast quarter of northeast quarter of section 28, township 1 south, range 8 west, San Bernardino base and meridian; again, beginning at a point in city of Los Angeles, near depot; running thence south through Florence to Wilmington; thence skirting west side of San Pedro bay to depot at Fayal; right of way for 115 miles, 100 feet wide; for 21 miles, 50 feet wide; through public thoroughfares, 6.48 miles long, being a distance of 142.48 miles in Los Angeles county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total
31 assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant to the counties in said State in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the county of Los Angeles was the sum of $2,299,571; and the number of miles of defendant's railway laid in said county of Los Angeles, and so assessed, were 142.48 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county auditor of said county of Los Angeles a statement showing the length of the main track of defendant's railway within said county, with a description of the whole of the defendant's railway track within said county, including the right of way sufficient for identification; the assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, road-bed, rails, and rolling stock of defendant's railway in said State, and the amount apportioned to said county of Los Angeles; and said description in said statement of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter
32 upon said assessment-roll of said county the said amount of said assessment apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation. Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track, and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant, assessed and apportioned to said county as aforesaid, and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant, assessed and apportioned to said county as aforesaid, was the sum of $20,149.03.

VIII. That defendant has never at any time paid said tax, amounting to said sum of $20,149.03, nor any part thereof; that said tax became and was delinquent on the last Monday in
33 December, 1887, at six o'clock, p. m., and upon and at the time of and by reason of such delinquency five per cent. of said tax, to wit, the sum of $1,007.45, was, by the controller of said State, added to said tax, and no part of said $1,007.45, so added for delinquency, has ever been paid by defendant.

IX. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property to the county of Los Angeles.

Before the fourth Monday of October, 1887, said controller did compute, at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums, in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after
34 the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circu-

lation published at the State capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of railway assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at 6 o'clock p. m., and that unless paid to the State treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof.

That a reasonable compensation for legal services by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

Plaintiff further complains of defendant, and for a 5th cause of action avers:

I. That defendant is and was, at all times herein mentioned, a corporation organized and existing under the laws of the State of California, engaged in operating a railroad in more than one county in said State.

II. That on the thirteenth day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State
35 and county taxation for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking cars, 13; baggage, express and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand and section cars, and all other kinds of cars, 297; total number of miles of railway in said State, 1,022.33 miles; franchise, roadway, road-bed and rails within said State, the same as hereinbefore described in the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed and rails, so far as the same pertained to and were within the county of Monterey, in said State, were as follows, to wit:

Beginning at a point in northeast quarter of section 16, township 12 south, range 3 east, being on the easterly line of Monterey
36 county, about 400 yards easterly from Sandcut station; thence running westerly to Pajaro station; thence southerly to a point on north bank of Elkhorn slough, near center of section 28, township 12 south, range 2 east; thence following general course

of east bank of the slough to southwest corner section 10, township 13 south, range 2 east; thence southerly, through Castroville and Salinas city, to point in center of section 3, township 17 south, range 5 east; thence southeasterly to depot at Soledad; thence southeasterly along east bank of Salinas river to north line of township 18 south, range 7 east; thence southeasterly, following the general meanderings of said river, and across said township and township 19 south, range 7 east; thence across townships 19 and 20, range 8 east; thence across townships 20 and 21 south, range 9 east; thence across townships 21 and 22 and 23 south, range 10 east; thence easterly and southeasterly along the Salinas river, in township 24 south, range 11 east, crossing the Salinas river in section 26, township 24 south, range 11 east; thence southerly to section 1, township 25 south, range 11 east, being the south line of Monterey county; townships and ranges of Mt. Diablo base and meridian; right of way 100 feet wide, being a distance of 109.14 miles in Monterey county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total
37 assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant to the counties in said State in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the county of Monterey was the sum of $1,761,476, and the number of miles of defendant's railway laid in said county of Monterey, and so assessed, were 109.14 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county auditor of said county of Monterey a statement showing the length of the main track of defendant's railway within said county, with a description of the whole of the defendant's railway track within said county, including the right of way sufficient for identification, the assessed value per mile of the same as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, road-bed, rails and rolling stock of defendant's railway in said State, and the amount apportioned to said county of Monterey; and said description in said statement of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter
38 upon said assessment-roll of said county the said amount of said assessment apportioned by said State board of equalization to said county in the column of the said county assessment-roll which showed the total value of all property of said county for taxation. Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of

equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track, and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant, assessed and apportioned to said county as aforesaid; and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant, assessed and apportioned to said county as aforesaid, was the sum of $13,070.15.

VIII. That defendant has never at any time paid said tax, amounting to said sum of $13,070.15, nor any part thereof; that said tax became and was delinquent on the last Monday in December, 1887, at six o'clock p. m., and upon and at the time of and
39 by reason of such delinquency five per cent. of said tax, to wit, the sum of $653.50, was by the controller of said State added to said tax, and no part of said $653.50 so added for delinquency has ever been paid by defendant.

IX. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property to the county of Monterey. Before the fourth Monday of October, 1887, said controller did compute, at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State
40 capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at six o'clock p. m., and that, unless paid to the State treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof. That a reasonable compensation for legal services by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of

action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

Plaintiff further complains of defendant, and for a 6th cause of action avers:

I. That defendant is and was, at all times herein mentioned, a corporation organized and existing under the laws of the State of California, engaged in operating a railroad in more than one county in said State.

II. That on the thirteenth day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more
41 than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking cars, 13; baggage, express and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand and section cars, and all other kinds of cars, 297; total number of miles of railway in said State, 1,022.33 miles; franchise, roadway, road-bed and rails within said State, the same as hereinbefore described in the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed and rails, so far as the same pertained to and were within the county of San Benito, in said State, were as follows, to wit:

Beginning at a point in center of railroad bridge crossing Pajaro river, near center of north line of section 10, township 22 south, range 3 east; thence westerly to a point about 400 yards east
42 of Sandcut station, a distance of 2.25 miles; again, beginning at a point near the center of the northeast quarter of northeast quarter of section 27, township 11 south, range 4 east, near the center of railroad bridge crossing Pajaro river, running southeasterly in a direct line to depot in town of Hollister; thence in same direction to Tres Pinos, a distance of 15.40 miles; townships and ranges Mt. Diablo base and meridian; right of way 100 feet wide, being a distance of 17.65 miles in San Benito county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant to the counties in said State in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the county of San Benito was the sum of $284,864; and the number of miles of defendant's

railway laid in said county of San Benito, and so assessed, were 17.65 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county auditor of said county of San Benito a statement showing the length of the main track of defendant's railway within said county, with a description of the whole of the defendant's railway track within said county, including the right of way sufficient for identification, the
43 assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, road-bed, rails and rolling stock of defendant's railway in said State, and the amount apportioned to said county of San Benito; and said description in said statement of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter upon said assessment-roll of said county the said amount of said assessment apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation. Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track, and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

VII. That thereafter, and on the first Monday of October,
44 1887, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant, assessed and apportioned to said county as aforesaid, and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant, assessed and apportioned to said county as aforesaid, was the sum of $2,944.11.

VIII. That defendant has never at any time paid said tax, amounting to said sum of $2,944.11, nor any part thereof; that said tax became and was delinquent on the last Monday in December, 1887, at six o'clock p. m., and upon and at the time of and by reason of such delinquency five per cent. of said tax, to wit, the sum of $147.20 was, by the controller of said State, added to said tax, and no part of said $147.20 so added for delinquency has ever been paid by defendant.

IX. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said

duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property to the county of San Benito.

45 Before the fourth Monday of October, 1887, said controller did compute, at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization, said duplicate record of assessments of railways, and said duplicate record of apportionment of assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at six o'clock p. m., and that, unless paid to the State treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof. That a reasonable compensation for legal services, by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

46 Plaintiff further complains of defendant, and for a 7th cause of action avers:

I. That defendant is and was, at all times herein mentioned, a corporation organized and existing under the laws of the State of California, engaged in operating a railroad in more than one county in said State.

II. That on the thirteenth day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking cars, 13; baggage, express and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand and section

cars, and all other kinds of cars, 297; total number of miles
47 of railway in said State, 1,022.33 miles; franchise, roadway, road-bed and rails within said State the same as hereinbefore described in the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed and rails, so far as the same pertained to and were within the county of San Bernardino, in said State, were as follows, to wit:

Beginning at a point on east line of Los Angeles county where the east line of the county intersects the northeast quarter of northeast quarter of section 28, township 1 south, range 8 west; running thence east through township 1 south, ranges 7, 6, 5 and 4 west, to Mound City station; thence southeasterly through San Gorgonio pass to a point on north line of San Diego county, intersected by northeast quarter of southwest quarter section 9, township 3 south, range 1 east; also, beginning at a point on north line of San Diego county, in southwest quarter of northeast quarter section 11, township 3 south, range 1 east; thence running east to a point on said north line of San Diego county, in southeast quarter of northwest quarter section 7, township 3 south, range 2 east; townships and ranges being San Bernardino base and meridian; right of way 100 feet wide, being a distance on this division of 54.60 miles in San Bernardino county; also, beginning at a point on east line of Kern county, in northeast quarter of southwest quarter of section 4, township 10 north, range 7 west; thence in a gen-
48 eral easterly and southeasterly direction, through Cramer, Daggett and Haslett, to a point in southwest quarter section 3, township 7 north, range 7 east; thence continuing in same general course through Ludlow and Aubrey to center of Colorado river, at Needles; townships and ranges San Bernardino base and meridian; right of way 100 feet wide, being in this division 206.87 miles in San Bernardino county, making a total distance of 261.47 miles in San Bernardino county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total assessment of the franchise, roadway, road-bed, rails, and rolling stock of defendant to the counties in said State in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the county of San Bernardino was the sum of $4,220,022; and the number of miles of defendant's railway laid in said county of San Bernardino, and so assessed, were 261.47 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county auditor of said county of San Bernardino a statement showing the length of the main track of defendant's railway within said county, with a description of the whole of the defendant's railway track
49 within said county, including the right of way sufficient for identification, the assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value

of the whole franchise, roadway, road-bed, rails and rolling stock of defendant's railway in said State, and the amount apportioned to said county of San Bernardino; and said description in said statement of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter upon said assessment-roll of said county the said amount of said assessment apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation. Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track, and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

50 VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant, assessed and apportioned to said county as aforesaid, and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant assessed and apportioned to said county as aforesaid, was the sum of $30,468.56.

VIII. That defendant has never at any time paid said tax, amounting to said sum of $30,468 56, nor any part thereof; that said tax became and was delinquent on the last Monday in December, 1887, at six o'clock p. m., and upon and at the time of and by reason of such delinquency five per cent. of said tax, to wit, the sum of $1,523.42, was, by the controller of said State, added to said tax, and no part of said $1,523.42 so added for delinquency has ever been paid by defendant.

IX. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's said

51 property, and the said apportionment of the assessment of defendant's property to the county of San Bernardino.

Before the fourth Monday of October, 1887, said controller did compute at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid

by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at six o'clock, p. m., and that unless paid to the State treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof. That a reasonable compensation for legal services,
52 by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

Plaintiff further complains of defendant, and for an 8th cause of action avers:

I. That defendant is and was, at all times herein mentioned a corporation organized and existing under the laws of the State of California, engaged in operating a railroad in more than one county in said State.

II. That on the thirteenth day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking
53 cars, 13; baggage, express, and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand, and section cars, and all other kinds of cars, 297; total number of miles of railway in said State, 1,022.33 miles; franchise, roadway, road-bed and rails within said State the same as hereinbefore described in the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed and rails, so far as the same pertained to and were within the county of San Diego, in said State, were as follows, to wit:

Beginning at a point on the north line of San Diego county, in the northeast quarter of southwest quarter of section 9, township 3 south, range 1 east; thence easterly, curving southerly, to a point on the north line of the county, in the southwest quarter of northwest quarter of section 11, township 3 south, range 1 east; again, beginning at a point on the north line of the county, in southeast quarter of northwest quarter of section 7, township 3 south, range 2 east; thence running southeasterly, through Indio, Seven Palms and Palm Creek station, to center of bridge across Colorado river, in southwest quarter of southeast quarter section 26, township 16 south, range 22 east; townships and ranges San Bernardino base and meridian; right of way 100 feet, being 158.85 miles in San Diego county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said
54 total assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant to the counties in said State in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the county of San Diego was the sum of $2,563,776, and the number of miles of defendant's railway laid in said county of San Diego, and so assessed, were 158.85 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county auditor of said county of San Diego a statement showing the length of the main track of defendant's railway within said county, with a description of the whole of the defendant's railway track within said county, including the right of way sufficient for identification, the assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, road-bed, rails and rolling stock of defendant's railway in said State and the amount apportioned to said county of San Diego; and said description in said statement of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter
55 upon said assessment-roll of said county the said amount of said assessment apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation. Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track, and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant, assessed and apportioned to said county as aforesaid; and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant, assessed and apportioned to said county as aforesaid, was the sum of $25,432.65.

VIII. That defendant has never at any time paid said tax amounting to said sum of $25,432.65, nor any part thereof; that said tax became and was delinquent on the last Monday in
56 December, 1887, at six o'clock, p. m., and upon and at the time of and by reason of such delinquency five per cent. of said tax, to wit, the sum of $1,271.63, was, by the controller of said State, added to said tax, and no part of said $1,271.63 so added for delinquency has ever been paid by defendant.

IX. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property to the county of San Diego.

Before the fourth Monday of October, 1887, said controller did compute at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That
57 within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at 6 o'clock p. m., and that, unless paid to the State treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof. That a reasonable compensation for legal services, by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

Plaintiff further complains of defendant, and for a 9th cause of action avers:

I. That defendant is and was at all times herein mentioned, a corporation organized and existing under the laws of the State of California, engaged in operating a railroad in more than one county in said State.

II. That on the thirteenth day of August, A. D. 1887, the
58 State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking cars, 13; baggage, express and mail cars, 22; cabooses, 19; box freight cars, 1,206; flat freight cars, 408; dump, hand and section cars, and all other kinds of cars, 297; total number of miles of railway in said State, 1,022.33 miles; franchise, roadway, road-bed and rails within said State the same as hereinbefore described in the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed and rails, so far as the same pertained to and were within the city and county of San Francisco, in said State, were as follows, to wit:

Beginning at depot in 100-vara lot 165, E. corner Fourth
59 and Townsend streets, running southwesterly across Fourth street into Townsend street; thence southwesterly along Townsend street to northwest corner of North Potrero block 133; thence westerly, across said corner and through North Potrero blocks 99, 98, 69, 68, 45 and 44, to east line of block 23; thence southwesterly, through blocks 23, 21, 22, 7 and 6, to line of Harrison street, where it intersects Sixteenth street; thence south and along Harrison street to its intersection of Twenty-second street; thence southwesterly, through blocks 139, 153, 154, 171, 170, 184, to west line of San Jose avenue; thence same direction, through portions of blocks 6, 32, 33, 34, 57, 56, 55 and 54, to south line of Twenty-ninth street; thence southerly, through blocks 53, 52 and 29, to south line of Randall street where it intersects the old San Jose road; thence along the road southerly through San Miguel rancho to north line of Ocean House road; thence southerly through San Miguel to block 2, West End Homestead; thence southwesterly to Railroad avenue; thence along the avenue westerly to Rancho Laguna de la Merced; thence continuing southwesterly to a point on north line of section 1, township 3 south, range 6 west, Mt. Diablo base and meridian, said point being near center of said line,

and intersected by the south line of the city and county of San Francisco; right of way, except through public thoroughfares, averaging 30 feet wide, being 7.36 miles in the city and county of San Francisco.

60 IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant to the counties in said State in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the city and county of San Francisco was the sum of $118,788; and the number of miles of defendant's railway laid in said city and county of San Francisco, and so assessed, were 7.36 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county auditor of said city and county of San Francisco a statement showing the length of the main track of defendant's railway within said county, with a description of the whole of the defendant's railway track within said county, including the right of way sufficient for identification; the assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, road-bed, rails and rolling stock of defendant's railway in said State, and the amount apportioned to said city and county of San Francisco, and said description in said statement of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

61 VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter upon said assessment-roll of said county the said amount of said assessment apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation. Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track, and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant, assessed and apportioned to said county as aforesaid; and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant, assessed and apportioned to said county as aforesaid, was the sum of $1,363.45.

62 VIII. That defendant has never at any time paid said tax, amounting to said sum of $1,363.45, nor any part thereof; that said tax became and was delinquent on the last Monday in December, 1887, at six o'clock, p. m., and upon and at the time of and by reason of such delinquency five per cent. of said tax, to wit, the sum of $68.17, was, by the controller of said State, added to said tax, and no part of said $68.17 so added for delinquency has ever been paid by defendant.

IX. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property, to the city and county of San Francisco.

Before the fourth Monday of October, 1887, said controller did compute, at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment,

63 and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways and said duplicate record of apportionment of assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at 6 o'clock p. m., and that unless paid to the State treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof. That a reasonable compensation for legal services, by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

Plaintiff further complains of defendant, and for a 10th cause of action avers:

I. That defendant is and was at all times herein mentioned a corporation organized and existing under the laws of the State of California, engaged in operating a railroad in more than one county in said State.

64 II. That on the thirteenth day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30,

1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking cars, 13; baggage, express and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand, and section cars, and all other kinds of cars, 297; total number of miles of railway in said State, 1,022.33 miles; franchise, roadway, road-bed and rails within said State, the same as hereinbefore described in the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed and rails, so far as the same pertained to and were within the county of San Luis Obispo, in said State, were as follows, to wit:

65 Beginning on the north line of the northeast quarter of northeast quarter of section 1, township 25 south, range 11 east; thence running easterly into and across section 6 and across section 8 to the town of San Miguel, in section 17; thence through San Miguel southerly to the center line of section 29, in southeast quarter of northeast quarter of said section, township 25 south, range 12 east, all of Mt. Diablo base and meridian; right of way 100 feet wide, being a distance of 5.45 miles in San Luis Obispo county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant to the counties in said State in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the county of San Luis Obispo was the sum of $87,961; and the number of miles of defendant's railway laid in said county of San Luis Obispo, and so assessed, were 5.45 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county auditor of said county of San Louis Obispo a statement showing the length of the main track of defendant's railway within said county, with a description of the whole of the defendant's railway track

66 within said county, including the right of way sufficient for identification, the assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, road-bed, rails and rolling stock of defendant's railway in said State, and the amount apportioned to said county of San Luis Obispo; and said description in said statement

of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter upon said assessment-roll of said county the said amount of said assessment apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation. Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track, and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

67 VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant, assessed and apportioned to said county as aforesaid; and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant, assessed and apportioned to said county as aforesaid, was the sum of $934.14.

VIII. That defendant has never at any time paid said tax, amounting to said sum of $934.14, nor any part thereof; that said tax became and was delinquent on the last Monday in December, 1887, at six o'clock p. m., and upon and at the time of and by reason of such delinquency five per cent. of said tax, to wit, the sum of $46.70, was, by the controller of said State, added to said tax, and no part of said $46.70 so added for delinquency has ever been paid by defendant.

IX. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's

68 said property, and the said apportionment of the assessment of defendant's property to the county of San Luis Obispo.

Before the fourth Monday of October, 1887, said controller did compute, at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the

fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of railway assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at six o'clock p. m., and that, unless paid to the State treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof.

That a reasonable compensation for legal services by Lang-
69 horne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

Plaintiff further complains of defendant, and for a 11th cause of action avers:

I. That defendant is and was, at all times herein mentioned, a corporation organized and existing under the laws of the State of California, engaged in operating a railroad in more than one county in said State.

II. That on the 13th day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by the defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking
70 cars, 13; baggage, express and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand and section cars and all other kinds of cars, 297; total number of miles of railway in said State, 1,022.33 miles; franchise, roadway, road-bed and rails within said State, the same as hereinbefore described in the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed and rails, so far as the same pertained to and were within the county of San Mateo, in said State, were as follows, to wit:

Beginning on the north boundary of San Mateo county, on the north line of section 1, township 3 south, range 6 west, near the center of the line, Mt. Diablo base and meridian; thence running southeasterly, through the towns of San Bruno, San Mateo and Redwood City, to a point on San Francisquito creek, near the southeast

corner of section 34, township 5 south, range 3 west, said base and meridian, being the south line of the county, with right of way averaging 60 feet, being a distance of 25.10 miles in San Mateo county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant to the counties in said State in which de-
71 fendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the county of San Mateo was the sum of $405,104, and the number of miles of defendant's railway laid in said county of San Mateo, and so assessed, were 25.10 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county auditor of said county of San Mateo a statement showing the length of the main track of defendant's railway within said county, with a description of the whole of the defendant's railway track within said county, including the right of way sufficient for identification, the assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, road-bed, rails and rolling stock of defendant's railway in said State, and the amount apportioned to said county of San Mateo; and said description in said statement of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter upon said assessment-roll of said county the said amount of
72 said assessment apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation. Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track, and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant, assessed and apportioned to said county as aforesaid; and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant, assessed and apportioned to said county as aforesaid, was the sum of $3,208.42.

VIII. That defendant has never at any time paid said tax,

amounting to said sum of $3,208.42, nor any part thereof; that said tax became and was delinquent on the last Monday in December, 1887, at six o'clock p. m., and upon and at the time of and
73 by reason of such delinquency five per cent. of said tax, to wit, the sum of $160.42, was, by the controller of said State, added to said tax, and no part of said $160.42 so added for delinquency has ever been paid by defendant.

IX. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property to the county of San Mateo.

Before the fourth Monday of October, 1887, said controller did compute, at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation pub-
74 lished in the State capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of railway assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at six o'clock p. m., and that unless paid to the State treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof. That a reasonable compensation for legal services, by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

Plaintiff further complains of defendant, and for a 12th cause of action avers:

I. That defendant is and was at all times herein mentioned a corporation organized and existing under the laws of the State of California, engaged in operating a railroad in more than one county in said State.

II. That on the thirteenth day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30, 1888,
75 did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway

road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking cars, 13; baggage, express and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand and section cars, and all other kinds of cars, 297; total number of miles of railway in said State, 1,022.33 miles; franchise, roadway, road-bed and rails within said State the same as hereinbefore described in the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed and rails, so far as the same pertained to and were within the county of Santa Clara, in said State, were as follows, to wit:

Beginning at a point on the northwesterly boundary of Santa Clara county, in the middle of the bridge across San Francisquito creek, near the southeast corner of section 34, township 5
76 south, range 3 west; thence running southeasterly, through the towns of Mayfield, Mountain View and Santa Clara, to westerly line of city of San José; thence running east to depot in San José; thence to Fourth street; thence with Fourth street to southeast line of city; thence southeasterly to town of Gilroy; thence in same course to Carnardero; thence south to point near the north bank of Pajaro river, in southeast quarter of section 5, township 12 south, range 4 east; thence west with the river to east line of Santa Cruz county; again, beginning at Carnardero station aforesaid, and running southeasterly to a point near the center of northeast quarter of southeast quarter section 27, township 11 south, range 4 east, said point being on southeast line of the county, townships and ranges of Mt. Diablo base and meridian; right of way for 18 miles, averaging 60 feet wide; and for 40 miles, 100 feet wide; 1.30 miles in public thoroughfares, being a distance of 59.30 miles in Santa Clara county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant to the counties in said State in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the county of
77 Santa Clara was the sum of $957,078; and the number of miles of defendant's railway laid in said county of Santa Clara, and so assessed, were 59.30 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county

auditor of said county of Santa Clara a statement showing the length of the main track of defendant's railway within said county, with a description of the whole of the defendant's railway track within said county, including the right of way sufficient for identification, the assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, road-bed, rails and rolling stock of defendant's railway in said State, and the amount apportioned to said county of Santa Clara; and said description in said statement of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter upon said assessment-roll of said county the said amount of said assessment apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation.

78 Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant, assessed and apportioned to said county as aforesaid, and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant, assessed and apportioned to said county as aforesaid, was the sum of $5,395.24.

VIII. That defendant has never at any time paid said tax, amounting to said sum of $5,395.24, nor any part thereof; that said tax became and was delinquent on the last Monday in December, 1887, at six o'clock, p. m., and upon and at the time of and by reason of such delinquency five per cent. of said tax, to wit, the sum of $269.76, was, by the controller of said State, added to said tax, and no part of said $269.76 so added for delinquency has ever been paid by defendant.

IX. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the

79 controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property to the county of Santa Clara.

Before the fourth Monday of October 1887, said controller did compute at the rates of taxation fixed and levied as aforesaid and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record; that within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways, and said duplicate record of apportion-
80 ment of railway assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at 6 o'clock p. m., and that unless paid to the State treasurer at the capitol prior thereto five per cent. would be added to the amount thereof.

That a reasonable compensation for legal services by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

Plaintiff further complains of defendant, and for a 13th cause of action avers:

I. That defendant is and was, at all times herein mentioned, a corporation organized and existing under the laws of the State of California, engaged in operating a railroad in more than one county in said State.

II. That on the thirteenth day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified state-
81 ment thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking cars, 13; baggage, express and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand and section cars, and all other kinds of cars, 297; total number of miles of railway in said State, 1,022.33 miles; franchise, roadway, road-bed and rails within said State, the same as hereinbefore described in

the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed and rails, so far as the same pertained to and were within the county of Santa Cruz, in said State, were as follows, to wit:

Beginning at a point on east line of Santa Cruz county, near a point where the southeast corner intersects the Pajaro river; running thence westerly with said river to center of railroad bridge crossing the said river, with right of way 100 feet wide, being a distance of 2.15 miles in Santa Cruz county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant to the counties in said State in which de-
82 fendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the county of Santa Cruz was the sum of $34,700; and the number of miles of defendant's railway laid in said county of Santa Cruz, and so assessed, were 2.15 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county auditor of said county of Santa Cruz a statement showing the length of the main track of defendant's railway within said county, with a description of the whole of the defendant's railway track within said county, including the right of way sufficient for identification, the assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, road-bed, rails and rolling stock of defendant's railway in said State, and the amount apportioned to said county of Santa Cruz; and said description in said statement of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter upon said assessment-roll of said county the said amount of said assessment apportioned by said State board of equalization to said county,
83 in the column of the said county assessment-roll which showed the total value of all property of said county for taxation. Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track, and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property

of defendant, assessed and apportioned to said county as aforesaid, and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant, assessed and apportioned to said county as aforesaid, was the sum of $406.68.

VIII. That defendant has never at any time paid said tax, amounting to said sum of $406.68, nor any part thereof; that said tax became and was delinquent on the last Monday in December, 1887, at six o'clock, p. m., and upon and at the time of and by reason of such delinquency five per cent. of said tax, to wit, the sum of $20.33 was, by the controller of said State, added to said tax, and no part of said $20.33 so added for delinquency has ever been paid by defendant.

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IX. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property to the county of Santa Cruz.

Before the fourth Monday of October, 1887, said controller did compute, at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of railway assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at 6 o'clock p. m., and that, unless paid to the State treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof.

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That a reasonable compensation for legal services by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

Plaintiff further complains of defendant, and for a 14th cause of action avers:

I. That defendant is and was, at all times herein mentioned, a corporation organized and existing under the laws of the State of

California, engaged in operating a railroad in more than one county in said State.

II. That on the thirteenth day of August, A. D. 1887, the State board of equalization of said State, for the purposes of State and county taxation for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and
86 being within said State, at the sum of sixteen million five hundred thousand dollars.

III. That said property was in and by said assessment described as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, and said description was as follows, to wit: Rolling stock, to wit: locomotives (including tenders), 82; sleepers, cars, 1; passenger cars, 94; emigrant and smoking cars, 13; baggage, express and mail cars, 22; cabooses, 19; box freight cars, 1,256; flat freight cars, 408; dump, hand and section cars, and all other kinds of cars, 297; total number of miles of railway in said State, 1,022.33 miles; franchise, roadway, road-bed and rails within said State, the same as hereinbefore described in the first cause of action herein, which description is hereby referred to and made a part hereof; and the said description of said franchise, roadway, road-bed and rails, so far as the same pertained to and were within the county of Tulare, in said State, *were* as follows, to wit:

Beginning at a point of intersection of the southwest quarter of southwest quarter of section 4, township 19 south, range 20 east, with the northwest line of Tulare county; thence running easterly, through the towns of Hanford and Lemoore, to the intersection of Central Pacific and Southern Pacific tracks at Goshen; thence
87 continuing southeasterly, through township 19 south, range 24 east, to town of Tulare; thence southerly through Tipton to intersection of north line of Kern county with south line of southeast quarter of southeast quarter of section 34, township 24 south, range 25 east, townships and ranges Mt. Diablo base and meridian; right of way 100 feet wide, being a distance of 62.48 miles in Tulare county.

IV. That within ten days after the third Monday in August, 1887, said State board of equalization did apportion the said total assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant to the counties in said State in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amount of said total assessment so apportioned by said board to the county of Tulare was the sum of $1,008,402; and the number of miles of defendant's railway laid in said county of Tulare, and so assessed, were 62.48 miles.

V. That within ten days after the third Monday in August, 1887, said State board of equalization did transmit to the county auditor of said county of Tulare a statement showing the length of the

main track of defendant's railway within said county, with a description of the whole of the defendant's railway track within said county, including the right of way sufficient for identification, the assessed value per mile of the same, as fixed by said *pro rata*
88 distribution per mile of the said assessed value of the whole franchise, roadway, road-bed, rails and rolling stock of defendant's railway in said State, and the amount apportioned to said county of Tulare; and said description in said statement of defendant's railway track, including its right of way in said county, was the same as that hereinbefore given in paragraph III.

VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of said county did enter said statement of said board on the assessment-roll of said county, and did enter upon said assessment-roll of said county the said amount of said assessment apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation. Thereafter, and on the first Monday in October, 1887, the board of supervisors of said county did make and cause to be entered in the proper record book an order stating and declaring the said length of main track of defendant's railway assessed by said State board of equalization within said county, the assessed value per mile of such railway in said county, the number of miles of track, and the assessed value of such railway lying in said county, as fixed by said State board of equalization.

VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of said county did levy the county
89 taxes upon the taxable property of said county, including the property of defendant, assessed and apportioned to said county as aforesaid; and the tax so levied for the purposes of said county taxation for the fiscal year ending June 30, 1888, upon said property of defendant, assessed and apportioned to said county as aforesaid, was the sum of $10,003.35.

VIII. That defendant has never at any time paid said tax, amounting to said sum of $10,003.35, nor any part thereof; that said tax became and was delinquent on the last Monday in December, 1887, at six o'clock p. m., and upon and at the time of and by reason of such delinquency five per cent. of said tax, to wit, the sum of $500.16, was, by the controller of said State, added to said tax, and no part of said $500.16 so added for delinquency has ever been paid by defendant.

IX. That prior to the third Monday of October, 1887, the said State board of equalization did prepare and transmit to the controller of said State a "duplicate record of assessment of railways," and a "duplicate record of apportionment of railway assessments," for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said State board of equalization, and which said duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property to the county of Tulare.

90 Before the fourth Monday of October, 1887, said controller did compute, at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent, to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of railway assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at 6 o'clock p. m., and that, unless paid to the State treasurer at the capitol prior thereto, five per cent. would be added to the amount thereof.

That a reasonable compensation for legal services, by Langhorne & Miller, attorneys for plaintiff, in the institution and prose-
91 cution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent.

Wherefore, plaintiff demands judgment against defendant for said several sums of State and county taxes delinquent and unpaid as aforesaid, and aggregating the sum of $251,134.26, together with five per cent. thereon for delinquency and non-payment of said taxes, and together with interest on said sum of $251,134.26 at the rate of two per cent. per month, from the last Monday of December, 1887, the time of said delinquency; also for costs of suit, and for its attorneys' fees, as allowed by law.

JOHN P. DUNN,
Controller of State of California,
By F. T. DUNN,
Deputy Controller of State.
LANGHORNE & MILLER,
Attorneys for Controller and Plaintiff.

Demurrer of Defendant to Amended Complaint of Plaintiff.

On the 16th day of February, 1891, defendant duly served and filed its demurrer to the amended complaint of plaintiff herein as follows:

(Title of Court and Cause.)

Now comes the above-named defendant, The Southern Pacific Railroad Company, and demurs to the amended complaint of the plaintiff herein and assigns the following grounds, to wit:

92 First. That there is a defect of parties plaintiff, in this, that the counties of Fresno, Kern, Los Angeles, Monterey, San

Benito, San Bernardino, San Diego, San Francisco, San Luis Obispo, San Mateo, Santa Clara, Santa Cruz and Tulare should have been joined as parties plaintiff.

Second. That several causes of action have been improperly united, to wit: The first cause of action for the recovery of State taxes has been improperly united with the second cause of action for the recovery of county taxes of the county of Fresno, and has been improperly united with the third cause of action for the recovery of county taxes of the county of Kern, and has been improperly united with the fourth cause of action for the recovery of county taxes of the county of Los Angeles, and has been improperly united with the fifth cause of action for the recovery of county taxes of the county of Monterey, and has been improperly united with the sixth cause of action for the recovery of county taxes of the county of San Benito, and has been improperly united with the seventh cause of action for the recovery of county taxes of the county of San Bernardino, and has been improperly united with the eighth cause of action for the recovery of county taxes of the county of San Diego, and has been improperly united with the ninth cause of action for the recovery of county taxes of the city and county of San Francisco, and has been improperly united
93 with the tenth cause of action for the recovery of county taxes of the county of San Luis Obispo, and has been improperly united with the eleventh cause of action for the recovery of county taxes of the county of San Mateo, and has been improperly united with the twelfth cause of action for the recovery of county taxes of the county of Santa Clara, and has been improperly united with the thirteenth cause of action for the recovery of county taxes of the county of Santa Cruz, and has been improperly united with the fourteenth cause of action for the recovery of county taxes *for* the county of Tulare.

Third. That the court has no jurisdiction of the subject-matter of the action, nor the person of the defendant herein, for the following reasons: That sections 3666, 3667, 3668, 3669 and 3670 of the Political Code, under the provisions of which said action was instituted, are unconstitutional and void, in this, that said sections are in contravention of subdivisions third, tenth and twenty-ninth of section 25 of article 4 of the constitution of the State of California, which prohibit special legislation, and are in contravention of sec. 21 of article I, of the constitution of said State, and are in contravention of sec. 1 of article XII of the constitution of said State, in this, that burdens are placed upon corporations operating a railroad in more than one county that are not placed upon corporations operating a railroad in only one county. That
94 said sections of said Political Code are in contravention of section 1 of the 14th amendment to the Constitution of the United States, in this, that by the provisions thereof, this defendant is deprived of and denied the equal protection of the laws.

That, so far as the assessment of railroads operated in more than one county is concerned, sections 4 and 10 of article XIII of the State constitution are in contravention of section one of the

14th amendment of the Constitution of the United States, as thereby and thereunder persons or corporations owning such roads are deprived of property without due process of law, and are denied the equal protection of the laws. Hence the assessment and taxes herein are void.

Fourth. That the plaintiff has not the legal capacity to sue herein, for the reason that said sections of the Political Code, and said sections of the State constitution, are unconstitutional and void, as set forth in said third cause of demurrer, and because no law authorizes plaintiff to maintain said action.

Fifth. That the complaint does not state facts sufficient to constitute a cause of action.

Wherefore, defendant prays judgment against plaintiff, with costs.

H. S. BROWN,
Attorney for Defendant.

95 *Order Overruling Defendant's Demurrer.*

On the 12th day of September, 1892, the court, after full argument, overruled the said demurrer by an order entered as follows:

(Title of Court and Cause.)

In this cause the demurrer to the amended complaint having been heretofore submitted to the court for consideration and decision, it is by the court ordered that the said demurrer be and the same is hereby overruled, with ten days' leave to answer.

(Opinion of court filed.)

Answer of Defendant.

On the 12th day of October, 1892, the defendant duly served and filed its answer herein as follows:

(Title of Court and Cause.)

Comes now the above-named defendant, Southern Pacific Railroad Company, and for answer to the amended complaint of plaintiff herein says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State, either for the purposes of State and county taxation, or otherwise, for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said
96 State, the franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railroad then situate and being within said State, in the sum of sixteen million five hundred thousand dollars, or any other sum.

II.

As to each and every allegation contained in the third paragraph of said complaint, defendant says it has no knowlege or informa-

tion sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment, or any assessment, described as alleged in said third paragraph of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at all, said State board of equalization did apportion the said total alleged assessment, or any assessment, of the franchise, road-bed, roadway, rails and rolling stock, or any of them, of defendant to the counties in said State in which defendant's railway was located, or any of them, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amounts of said total alleged assessment alleged to have been apportioned by said board to said counties respectively, and the number of miles of defendant's railway line laid in said counties were as alleged in the 4th paragraph of said complaint, or otherwise.

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IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at all, the said State board of equalization did transmit to each or any of the county auditors of said counties, or any of them, a statement showing the length of the main track of defendant's railway within the county of said auditors respectively, or any of them, with a description of the whole or any portion of defendant's railway track within the counties of said auditors respectively, or any of them, denies that said alleged statement included the right of way sufficient for identification, or any of it, or the assessed value per mile of the same as fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock, or any thereof, of defendant's railway in said State, nor the amount alleged to have been apportioned to the counties of said auditors respectively, and denies that said alleged descriptions in said alleged statements of defendant's railway track, including its right of way in said counties respectively, were the same respectively, as those given in paragraph III of said complaint.

V.

Defendant denies that thereafter and prior to the first Monday in October, 1887, or at any other time, the county auditor of each of said counties, or any of said counties, did enter said alleged statement, alleged to have been so transmitted to him, upon the assessment-roll of his county; denies that he did enter upon said
98 assessment-roll of his county the said amount of said alleged assessment alleged to have been apportioned by said State board of equalization to his county in the column of the assessment-roll of his county which showed the total value of all property of his county for taxation, or elsewhere; denies that thereafter, or on

the first Monday in October, 1887, or at any other time, the board of supervisors of each or any of said counties did make or cause to be entered, in the proper or any record book or books respectively, an order stating and declaring the length of main track of defendant's railway alleged to have been assessed by said State board of equalization within their respective counties, nor the assessed value per mile of such railway, nor the number of miles of track, nor the alleged assessed value of such railway lying in their respective counties, nor as alleged to have been fixed by said State board of equalization.

VI.

Defendant denies that thereafter and on the first Monday of October, 1887, or at any other time, the board of supervisors of each or any of said counties did levy the State tax of said State of California according to the rate alleged to have been heretofore fixed for such tax for the fiscal year ending June 30, 1888, by said State board of equalization, or according to any other rate, upon the taxable property in its county, or upon the property of defendant alleged
99 to have been assessed and apportioned to its county as aforesaid; denies that the alleged taxes so alleged to have been levied in all of said counties for the purpose of State taxation upon said property of defendant alleged to have been assessed and apportioned to said counties as aforesaid was the sum of $100,320.00, or any other sum.

VII.

Denies that upon the seventeenth day of September, 1887, or any other day, said State board of equalization did fix the rate of State taxation for the fiscal year ending June 30, 1888, at the rate of $0.608 on each one hundred dollars, or at any other rate.

VIII.

Denies that said alleged State tax ever was a tax, or became or was delinquent on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time, or that it ever became delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county, or otherwise, or was ever charged to the collector of taxes, or any other State or county official, as a delinquent tax to be by him collected; denies that upon or at the time of or by reason of such delinquency five per cent. of said alleged State tax, to wit, the sum of $5,015.00, or any other per cent. or sum, was by the controller of said State added to said alleged State tax.

IX.

100 Denies that prior to the third Monday of October, 1887, or at any other time, the said State board of equalization did prepare or transmit to the controller of said State a duplicate or other record of assessment of railways, or a duplicate or other record of apportionment of railway assessments, for the fiscal year ending June 30, 1888, certified by the chairman and clerk of said

State board of equalization, or any record whatever; denies that said alleged duplicate records included the said alleged assessment of defendant's said property, or said alleged apportionment of the said alleged assessment of defendant's property to the said counties, or any of them.

(It is agreed by plaintiff and defendant that all averments in the amended complaint herein as to legal services or attorneys' fees are deemed to be fully and separately denied by defendant.)

IX A.

Defendant denies that it is a corporation duly or otherwise organized or existing under the laws of the State of California for the purpose of constructing railroads or carrying on the business of railroading in the said State, except as hereinafter specifically set out.

As to plaintiff's second alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State, for
101 the purposes of State and county taxation, or otherwise, for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock or any of them, of defendant's railroad, then situated and being within said State in the sum of sixteen million five hundred thousand dollars, or any other sum.

II.

As to each and every allegation contained in the third paragraph of said second count of said complaint, defendant says it has no knowledge or information sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment or any assessment described as alleged in said third paragraph of said second count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did apportion the said total alleged assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant, or any of them, to the counties in said State, or any of them, in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged to have
102 been apportioned by said board to the county of Fresno was the sum of $281,313, or any other sum, and denies that the number of miles of defendant's railway laid in said county

of Fresno and so alleged to have been assessed were 17.43, or any other number of miles.

IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said county of Fresno a statement showing the length of the main track of defendant's railway within said county, nor a description of the whole or any of defendant's railway track within said county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railway in said State, nor the amount apportioned to said county of Fresno, and denies that said alleged description in said alleged statement of defendant's railway track, including its right of way in said county, was the same as that given in paragraph III of said second count of said complaint.

V.

Defendant denies that thereafter and prior to the first Mon-
103 day in October, 1887, or at any other time, the county auditor of said county did enter said statement of said board on the assessment-roll of said county; denies that he entered upon said assessment-roll of said county the said amount of said alleged assessment alleged to have been apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation, or elsewhere; denies that thereafter and on the first Monday in October, 1887, or at any other time, the board of supervisors of said county did make or cause to be entered in the proper or other record book or books an order stating or declaring the said alleged length of main track of defendant's railway alleged to have been assessed by said State board of equalization within said county, nor the alleged assessed value per mile of such railway in said county, nor the number of miles of track, nor the alleged assessed value of said railway lying in said county as alleged to have been fixed by said State board of equalization.

VI.

Defendant denies that thereafter and on the first Monday of October, 1887, or at any other time, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant alleged to have been
assessed and apportioned to said county as aforesaid, and
104 denies that the alleged tax so alleged to have been levied for the purposes of said alleged county taxation for the fiscal year ending June 30, 1888, upon said property of defendant al-

leged to have been assessed and apportioned to said county as aforesaid, was the sum of $2,959.41, or any other sum.

VII.

Defendant denies that said alleged tax ever was a tax, or became or was delinquent on the last Monday in December, 1887, at six o'clock p. m., or at any other time, or that it ever became delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county, or otherwise, or was ever charged to the collector of taxes or any other State or county official, as a delinquent tax to be by him collected, and denies that upon or at the time of, or by reason of such alleged delinquency, five per cent. of said tax, to wit, the sum of $147.97 or any other per cent. or sum, was by the controller of said State added to said tax.

VIII.

Defendant denies that prior to the third Monday of October, 1887, or at any other time, the said State board of equalization did prepare or transmit to the controller of said State a duplicate or other record of assessment of railways or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888, and denies that the same was certified to by the chairman and clerk of said State board of equalization, and
105 denies that said alleged duplicate records included the said alleged assessments of defendant's said property, nor the said alleged apportionment of the alleged assessment of defendant's property to the county of Fresno.

VIII A.

Defendant denies that it is a corporation duly or otherwise organized or existing under the laws of the State of California, for the purpose of constructing railroads or carrying on the business of railroading in the said State, except as hereinafter specially set out.

As to plaintiff's third alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State, for the purposes of State and county taxation, or otherwise, for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof, in more than one county in said State, the franchise, roadway, road-bed, rails, and rolling stock, or any of them, of defendant's railroad, then situated and being within said State, in the sum of sixteen million five hundred thousand dollars, or any other sum.

II.

As to each and every allegation contained in the third paragraph of said third count of said complaint, defendant says it has
106 no knowledge or information sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment or any assessment described as alleged in said third paragraph of said third count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did apportion the said total alleged assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant, or any of them, to the counties in said State or any of them in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged to have been apportioned by said board to the county of Kern was the sum of $2,476,945, or any other sum, and denies that the number of miles of defendant's railway laid in said county of Kern and so alleged to have been assessed were 153.47 miles or any other number of miles.

IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said county of Kern a statement showing the length of the main track of defendant's
107 railway within said county, nor a description of the whole or any of defendant's railway track within said county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock or any of them, of defendant's said railway in said State, nor the amount apportioned to said county of Kern, and denies that said alleged description in said alleged statement of defendant's railway track including its right of way in said county was the same as that given in paragraph III of said third count of said complaint.

V.

Defendant denies that thereafter and prior to the first Monday in October, 1887, or at any other time, the county auditor of said county did enter said statement of said board on the assessment-roll of said county; denies that he entered upon said assessment-roll of said county the said amount of said alleged assessment alleged to have been apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation,

or elsewhere; denies that thereafter and on the first Monday in October, 1887, or at any other time, the board of supervisors of said county did make or cause to be entered in the proper or other
108 record book or books an order stating or declaring the said alleged length of main track of defendant's railway alleged to have been assessed by said State board of equalization within said county, nor the alleged assessed value per mile of such railway in said county, nor the number of miles of track, nor the alleged assessed value of said railway lying in said county as alleged to have been fixed by said State board of equalization.

VI.

Defendant denies that thereafter and on the first Monday of October, 1887, or at any other time, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant alleged to have been assessed and apportioned to said county aforesaid, and denies that the alleged tax so alleged to have been levied for the purposes of said alleged county taxation for the fiscal year ending June 30, 1888, upon said property of defendant alleged to have been assessed and apportioned to said county as aforesaid was the sum of $34,479.07, or any other sum.

VII.

Defendant denies that said alleged tax ever was a tax or became or was delinquent on the last Monday in December, 1887, at six o'clock p. m., or at any other time, or that it ever became delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county, or otherwise, or was ever charged to the
109 collector of taxes, or any other State or county official, as a delinquent tax to be by him collected, and denies that upon or at the time of or by reason of such alleged delinquency five per cent. of said tax, to wit, the sum of $1,723.95, or any other per cent. or sum was by the controller of said State added to said tax.

VIII.

Defendant denies that prior to the third Monday of October, 1887, or at any other time, the said State board of equalization did prepare or transmit to the controller of said State a duplicate or other record of assessment of railways or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888, and denies that the same was certified to by the chairman and clerk of said State board of equalization, and denies that said alleged duplicate records included the said alleged assessments of defendant's said property nor the said alleged apportionment of the alleged assessment of defendant's property to the county of Kern.

VIII A.

Defendant denies that it is a corporation duly or otherwise organized or existing under the laws of the State of California for the

purpose of constructing railroads or carrying on the business of railroading in the said State, except as hereinafter specially set out.

110 As to plaintiff's fourth alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State, for the purposes of State and county taxation, or otherwise, for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State the franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railroad then situated and being within said State, in the sum of sixteen million five hundred thousand dollars, or any other sum.

II.

As to each and every allegation contained in the third paragraph of said fourth count of said complaint, defendant says it has no knowledge or information sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment, or any assessment described as alleged in said third paragraph of said fourth count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did apportion the said total alleged assessment of
111 the franchise, roadway, road-bed, rails and rolling stock of defendant, or any of them, to the counties in said State, or any of them, in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged to have been apportioned by said board to the county of Los Angeles was the sum of $2,299,571.00, or any other sum, and denies that the number of miles of defendant's railway laid in said county of Los Angeles and so alleged to have been assessed were 142.48 or any other number of miles.

IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said county of Los Angeles a statement showing the length of the main track of defendant's railway within said county, nor a description of the whole or any of defendant's railway track within said county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have

been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railway in said State, nor the amount apportioned to said county of Los
112 Angeles, and denies that said alleged description in said alleged statement of defendant's railway track including its right of way in said county was the same as that given in paragraph III of said fourth count of said complaint.

V.

Defendant denies that thereafter and prior to the first Monday in October, 1887, or at any other time, the county auditor of said county did enter said statement of said board on the assessment-roll of said county; denies that he entered upon said assessment-roll of said county the said amount of said alleged assessment alleged to have been apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation, or elsewhere; denies that thereafter and on the first Monday in October, 1887, or at any other time, the board of supervisors of said county did make, or cause to be entered in the proper or other record book or books, an order stating or declaring the said alleged length of main track of defendant's railway alleged to have been assessed by said State board of equalization within said county, nor the alleged assessed value per mile of such railway in said county, nor the number of miles of track, nor the alleged assessed value of said railway, lying in said county, as alleged to have been fixed by said State board of equalization.

113 VI.

Defendant denies that thereafter and on the first Monday of October, 1887, or at any other time, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant alleged to have been assessed and apportioned to said county as aforesaid, and denies that the alleged tax so alleged to have been levied for the purposes of said alleged county taxation for the fiscal year ending June 30, 1888, upon said property of defendant alleged to have been assessed and apportioned to said county as aforesaid was the sum of $20,149.03, or any other sum.

VII.

Defendant denies that said alleged tax ever was a tax or became or was delinquent on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time, or that it ever became delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county, or otherwise, or was ever charged to the collector of taxes or any other State or county official, as a delinquent tax to be by him collected; and denies that upon or at the

time of or by reason of such alleged delinquency five per cent. of said tax, to wit, the sum of $1,007.43, or any other per cent. or sum was by the controller of said State added to said tax.

VIII.

Defendant denies that prior to the third Monday of October,
114 1887, or at any other time, the said State board of equalization did prepare or transmit to the controller of said State a duplicate or other record of assessment of railways or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888; and denies that the same was certified to by the chairman and clerk of said State board of equalization; and denies that said alleged duplicate records included the said alleged assessments of defendant's said property nor the said alleged apportionment of the alleged assessment of defendant's property to the county of Los Angeles.

VIII A.

Defendant denies that it is a corporation duly or otherwise organized or existing under the laws of the State of California, for the purpose of constructing railroads or carrying on the business of railroading in the said State, except as hereinafter specially set out.

As to plaintiff's fifth alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State for the purposes of State and county taxation, or otherwise, for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the
115 franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railroad, then situated and being within said State in the sum of sixteen million five hundred thousand dollars, or any other sum.

II.

As to each and every allegation contained in the third paragraph of said fifth count of said complaint, defendant says it has no knowledge or information sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment or any assessment described as alleged in said third paragraph of said fifth count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did apportion the said total alleged assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant, or any of

them, to the counties in said State or any of them in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged to have been apportioned by said board to the county of Monterey, was the sum of $1,761,476.00, or any other sum, and denies that the number of miles of defendant's railway laid in said county of Monterey,
116 and so alleged to have been assessed, were 109.14, or any other number of miles.

IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said county of Monterey, a statement showing the length of the main track of defendant's railway within said county, nor a description of the whole or any of defendant's railway track within said county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railway in said State, nor the amount apportioned to said county of Monterey, and denies that said alleged description in said alleged statement of defendant's railway track, including its right of way in said county, was the same as that given in paragraph III of said fifth count of said complaint.

V.

Defendant denies that thereafter and prior to the first Monday in October, 1887, or at any other time, the county auditor of said county did enter said statement of said board on the assessment-roll
117 of said county; denies that he entered upon said assessment-roll of said county the said amount of said alleged assessment alleged to have been apportioned by said State board of equalization to said county, in the column of the said county assessment-roll, which showed the total value of all property of said county for taxation, or elsewhere; denies that thereafter, and on the first Monday in October, 1887, or at any other time, the board of supervisors of said county did make or cause to be entered in the proper or other record book or books, an order stating or declaring the said alleged length of main track of defendant's railway, alleged to have been assessed by said State board of equalization within said county, nor the alleged assessed value per mile of such railway in said county, nor the number of miles of track, nor the alleged assessed value of said railway lying in said county, as alleged to have been fixed by said State board of equalization.

VI.

Defendant denies that thereafter and on the first Monday of October, 1887, or at any other time, the board of supervisors of said

county did levy the county taxes upon the taxable property of said county, including the property of defendant alleged to have been assessed and apportioned to said county as aforesaid, and denies that the alleged tax so alleged to have been levied for the purposes of said alleged county taxation for the fiscal year ending
118 June 30, 1888, upon said property of defendant alleged to have been assessed and apportioned to said county as aforesaid, was the sum of $13,070.15, or any other sum.

VII.

Defendant denies that said alleged tax ever was a tax or became or was delinquent on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time, or that it ever became delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county or otherwise, or was ever charged to the collector of taxes, or any other State or county official, as a delinquent tax to be by him collected, and denies that upon or at the time of or by reason of such alleged delinquency five per cent. of said tax, to wit, the sum of $653.50, or any other per cent. or sum, was by the controller of said State added to said tax.

VIII.

Defendant denies that prior to the third Monday of October, 1887, or at any other time, the said State board of equalization did prepare or transmit to the controller of said State a duplicate or other record of assessment of railways or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888, and denies that the same was certified to by the chairman and clerk of said State board of equalization, and denies that said alleged duplicate records included the said alleged assess-
119 ments of defendant's said property nor the said alleged apportionment of the alleged assessment of defendant's property to the county of Monterey.

VIII A.

Defendant denies that it is a corporation duly or otherwise organized or existing under the laws of the State of California for the purpose of constructing railroads or carrying on the business of railroading in said State, except as hereinafter specially set out.

As to plaintiff's sixth alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State, for the purposes of State and county taxation, or otherwise, for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railroad, then situated and being within said State, in

the sum of sixteen million five hundred thousand dollars, or any other sum.

II.

As to each and every allegation contained in the third paragraph of said sixth count of said complaint, defendant says it has
120 no knowledge or information sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment or any assessment described as alleged in said third paragraph of said sixth count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did apportion the said total alleged assessment of the franchise, roadway, road-bed, rails, and rolling stock of defendant, or any of them, to the counties in said State or any of them, in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged to have been apportioned by said board to the county of San Benito was the sum of $284,864.00, or any other sum, and denies that the number of miles of defendant's railway laid in said county of San Benito, and so alleged to have been assessed, were 17.65, or any other number of miles.

IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said county of San Benito a statement showing the length of the main track of defendant's
121 railway within said county, nor a description of the whole or any of defendant's railway track within said county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railway in said State, nor the amount apportioned to said county of San Benito, and denies that said alleged description in said alleged statement of defendant's railway track, including its right of way in said county, was the same as that given in paragraph III of said sixth count of said complaint.

V.

Defendant denies that thereafter and prior to the first Monday in October, 1887, or at any other time, the county auditor of said county did enter said statement of said board on the assessment-roll of said county; denies that he entered upon said assessment-roll of said county the said amount of said alleged assessment alleged to

have been apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation, or elsewhere; denies that thereafter and on the first Monday in October, 1887, or at any other time, the board of supervisors of said
122 county did make or cause to be entered in the proper or other record book or books, an order stating or declaring the said alleged length of main track of defendant's railway alleged to have been assessed by said State board of equalization within said county, nor the alleged assessed value per mile of such railway in said county, nor the number of miles of track, nor the alleged assessed value of said railway lying in said county, as alleged to have been fixed by said State board of equalization.

VI.

Defendant denies that thereafter and on the first Monday of October, 1887, or at any other time, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant alleged to have been assessed and apportioned to said county as aforesaid, and denies that the alleged tax so alleged to have been levied for the purposes of said alleged county taxation for the fiscal year ending June 30, 1888, upon said property of defendant alleged to have been assessed and apportioned to said county as aforesaid, was the sum of $2,944.11, or any other sum.

VII.

Defendant denies that said alleged tax ever was a tax, or became or was delinquent on the last Monday in December, 1887, at six o'clock p. m., or at any other time, or that it ever became delinquent;
123 denies that the same was ever placed on any list of delinquent taxes, State or county or otherwise, or was ever charged to the collector of taxes, or any other State or county official, as a delinquent tax to be by him collected; and denies that upon or at the time of or by reason of such alleged delinquency, five per cent. of said tax, to wit, the sum of $147.20, or any other per cent. or sum, was by the controller of said State added to said tax.

VIII.

Defendant denies that prior to the third Monday of October, 1887, or at any other time, the said State board of equalization did prepare or transmit to the controller of said State, a duplicate or other record of assessment of railways, or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888, and denies that the same was certified to by the chairman and clerk of said State board of equalization, and denies that said alleged duplicate records included the said alleged assessments of defendant's said property nor the said alleged apportionment of the alleged assessment of defendant's property to the county of San Benito.

VIII A.

Defendant denies that it is a corporation duly or otherwise organized or existing under the laws of the State of California for the purpose of constructing railroads or carrying on the business of railroading in the said State, except as hereinafter specially set out.

124 As to plaintiff's seventh alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State, for the purposes of State and county taxation, or otherwise, for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railroad then situated and being within said State in the sum of sixteen million five hundred thousand dollars, or any other sum.

II.

As to each and every allegation contained in the third paragraph of said seventh count of said complaint defendant says it has no knowledge or information sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment, or any assessment, described as alleged in said third paragraph of said seventh count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did apportion the said total alleged assessment of the fran-
125 chise, roadway, road-bed, rails and rolling stock of defendant, or any of them, to the counties in said State, or any of them, in which defendant's railway was located in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged to have been apportioned by said board to the county of San Bernardino was the sum of $4,220,022.00, or any other sum; and denies that the number of miles of defendant's railway laid in said county of San Bernardino, and so alleged to have been assessed, were 261.47, or any other number of miles.

IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said county of San Bernardino, a statement showing the length of the main track of defendant's railway within said county, nor a description of the whole or any of de-

fendant's railway track within said county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails, and rolling stock or any of them, of defendant's railway in said State, nor the amount apportioned to said county of San
126 Bernardino, and denies that said alleged description in said alleged statement of defendant's railway track including its right of way in said county was the same as that given in paragraph III of said seventh count of said complaint.

V.

Defendant denies that thereafter, and prior to the first Monday in October, 1887, or at any other time, the county auditor of said county did enter said statement of said board on the assessment-roll of said county; denies that he entered upon said assessment-roll of said county the said amount of said alleged assessment alleged to have been apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation, or elsewhere; denies that thereafter, and on the first Monday in October, 1887, or at any other time, the board of supervisors of said county did make, or cause to be entered in the proper or other record book or books, an order stating or declaring the said alleged length of main track of defendant's railway alleged to have been assessed by said State board of equalization within said county, nor the alleged assessed value per mile of such railway in said county nor the number of miles of track, nor the alleged assessed value of said railway lying in said county, as alleged to have been fixed by said State board of equalization.

VI.

Defendant denies that thereafter, and on the first Monday
127 of October, 1887, or at any other time, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant alleged to have been assessed and apportioned to said county as aforesaid, and denies that the alleged tax so alleged to have been levied for the purposes of said alleged county taxation for the fiscal year ending June 30, 1888, upon said property of defendant alleged to have been assessed and apportioned to said county as aforesaid, was the sum of $30,468.56, or any other sum.

VII.

Defendant denies that said alleged tax ever was a tax or became or was delinquent on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time, or that it ever became delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county or otherwise, or was ever charged to the collector of taxes,

or any other State or county official, as a delinquent tax to be by him collected, and denies that upon or at the time of, or by reason of such alleged delinquency, five per cent. of said tax, to wit, the sum of $1,523.42, or any other per cent. or sum, was by the controller of said State added to said tax.

VIII.

Defendant denies that prior to the third Monday of October, 1887, or at any other time, the said State board of equalization did prepare or transmit to the controller of said State, a duplicate or other record of assessment of railways, or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888, and denies that the same was certified to by the chairman and clerk of said State board of equalization; and denies that said alleged duplicate records included the said alleged assessments of defendant's said property, nor the said alleged apportionment of the alleged assessment of defendant's property to the county of San Bernardino.

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VIII A.

Defendant denies that it is a corporation duly or otherwise organized, or existing under the laws of the State of California, for the purpose of constructing railroads or carrying on the business of railroading in the said State, except as hereinafter specially set out.

As to plaintiff's eighth alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State, for the purposes of State and county taxation, or otherwise, for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railroad then situated and being within said State, in the sum of sixteen million five hundred thousand dollars, or any other sum.

129

II.

As to each and every allegation contained in the third paragraph of said eighth count of said complaint, defendant says it has no knowledge or information sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment, or any assessment, described as alleged in said third paragraph of said eighth count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization

did apportion the said total alleged assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant, or any of them, to the counties in said State, or any of them, in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged to have been apportioned by said board to the county of San Diego was the sum of $2,563,776.00, or any other sum, and denies that the number of miles of defendant's railway laid in said county of San Diego and so alleged to have been assessed were 158.85, or any other number of miles.

130

IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said county of San Diego a statement showing the length of the main track of defendant's railway within said county, nor a description of the whole or any of defendant's railway track within said county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railway in said State, nor the amount apportioned to said county of San Diego, and denies that said alleged description in said alleged statement of defendant's railway track, including its right of way in said county, was the same as that given in paragraph III of said eighth count of said complaint.

V.

Defendant denies that thereafter and prior to the first Monday in October, 1887, or at any other time, the county auditor of said county did enter said statement of said board on the assessment-roll of said county; denies that he entered upon said assessment-roll of said county the said amount of said al-

131 leged assessment alleged to have been apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation, or elsewhere: denies that thereafter and on the first Monday in October, 1887, or at any other time, the board of supervisors of said county did make or cause to be entered in the proper or other record book or books an order stating or declaring the said alleged length of main track of defendant's railway alleged to have been assessed by said State board of equalization within said county, nor the alleged assessed value per mile of such railway in said county nor the number of miles of track, nor the alleged assessed value of said railway lying in said county as alleged to have been fixed by said State board of equalization.

VI.

Defendant denies that thereafter and on the first Monday of October, 1887, or at any other time the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant alleged to have been assessed and apportioned to said county as aforesaid, and denies that the alleged tax so alleged to have been levied for the purposes of said alleged county taxation for the fiscal year ending June 30, 1888, upon said property of defendant alleged to have been assessed and apportioned to said county as aforesaid, was the sum of $25,432.65, or any other sum.

132

VII.

Defendant denies that said alleged tax ever was a tax or became or was delinquent on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time or that it ever became delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county or otherwise, or was ever charged to the collector of taxes or any other State or county official, as a delinquent tax to be by him collected, and denies that upon or at the time of or by reason of such alleged delinquency five per cent. of said tax, to wit, the sum of $1,271.63 or any other per cent. or sum was by the controller of said State added to said tax.

VIII.

Defendant denies that prior to the third Monday of October, 1887, or at any other time the said State board of equalization did prepare or transmit to the controller of said State a duplicate or other record of assessment of railways or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888, and denies that the same was certified to by the chairman and clerk of said State board of equalization, and denies that said alleged duplicate records included the said alleged assessments of defendant's said property nor the said alleged apportionment of the alleged assessment of defendant's property to the county of San Diego.

133

VIII A.

Defendant denies that it is a corporation duly or otherwise existing under the laws of the State of California, for the purpose of constructing railroads or carrying on the business of railroading in the said State, except as hereinafter set out.

As to plaintiff's ninth alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State for the purposes of State and county taxation, or otherwise, for

the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, of the franchise, roadway, road-bed, rails and rolling stock or any of them, of defendant's railroad then situated and being within said State in the sum of sixteen million five hundred thousand dollars, or any other sum.

II.

As to each and every allegation contained in the third paragraph of said ninth count of said complaint, defendant says it has no knowledge or information sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment, or any assessment described as alleged in said third
134 paragraph of said ninth count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did apportion the said total alleged assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant, or any of them, to the counties in said State, or any of them in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged to have been apportioned by said board to the city and county of San Francisco was the sum of $118,788.00, or any other sum, and denies that the number of miles of defendant's railway laid in said city and county of San Francisco, and so alleged to have been assessed, were 7.36, or any other number of miles.

IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said city and county of San Francisco a statement showing the length of the main track of defendant's railway within said city and county, nor a description of the whole or any of defendant's railway track within said city
135 and county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock, or any of them of defendant's railway in said State, nor the amount apportioned to said city and county of San Francisco, and denies that said alleged description in said alleged statement of defendant's railway track including its right of way in said city and county, was the same as that given in paragraph III of said ninth count of said complaint.

V.

Defendants denies that thereafter and prior to the first Monday in October, 1887, or at any other time, the county auditor of said county did enter said statement of said board on the assessment-roll of said city and county; denies that he entered upon said assessment-roll of said county the said amount of said alleged assesssment alleged to have been apportioned by said State board of equalization to said city and county, in the column of the said city and county assessment-roll, which showed the total value of all property of said city and county for taxation, or elsewhere; denies that thereafter and on the first Monday in October, 1887, or at any other time, the board of supervisors of said city and county, did make or cause to be entered in the proper or other record book or
136 books, an order stating or declaring the said alleged length of main track of defendant's railway alleged to have been assessed by said State board of equalization within said city and county, nor the alleged assessed value per mile of such railway in said county, nor the number of miles of track, nor the alleged assessed value of said railway lying in said city and county, as alleged to have been fixed by said State board of equalization.

VI.

Defendant denies that thereafter, and on the first Monday of October, 1887, or at any other time the board of supervisors of said city and county did levy the city and county taxes upon the taxable property of said city and county, including the property of defendant alleged to have been assessed and apportioned to said city and county as aforesaid; and denies that the alleged tax so alleged to have been levied for the purposes of said alleged city and county taxation for the fiscal year ending June 30, 1888, upon said property of defendant alleged to have been assessed and apportioned to said city and county as aforesaid, was the sum of $1,363.45, or any other sum.

VII.

Defendant denies that said alleged tax ever was a tax, or became or was delinquent on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time, or that it ever became
137 delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county, or otherwise, or was ever charged to the collector of taxes, or any other State or county official, as a delinquent tax to be by him collected; and denies that upon or at the time of or by reason of such alleged delinquency five per cent. of said tax, to wit, the sum of $68.17, or any other per cent. or sum, was by the controller of said State added to said tax.

VIII.

Defendant denies that prior to the third Monday of October, 1887, or at any other time the said State board of equalization did prepare or transmit to the controller of said State a duplicate or other

record of assessment of railways or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888; and denies that the same was certified to by the chairman and clerk of said State board of equalization; and denies that said alleged duplicate records included the said alleged assessments of defendant's said property nor the said alleged apportionment of the alleged assessment of the defendant's property to the city and county of San Francisco.

VIII A.

Defendant denies that it is a corporation duly or otherwise organized or existing under the laws of the State of California, for the purpose of constructing railroads or carrying on the business of railroading in the said State, except as hereinafter specially set out.

138 As to plaintiff's tenth alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State for the purposes of State and county taxation, or otherwise, for the fiscal year ending June 30, 1888, did assess to defendant then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railroad, then situated and being within said State, in the sum of sixteen million five hundred thousand dollars, or any other sum.

II.

As to each and every allegation contained in the third paragraph of said tenth count of said complaint, defendant says it has no knowledge or information sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment, or any assessment described as alleged in said third paragraph of said tenth count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equal-
139 ization did apportion the said total alleged assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant, or any of them, to the counties in said State, or any of them, in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged to have been apportioned by said board to the county of San Luis Obispo was the sum of $87,961.00, or any other sum, and denies that the number of miles of defendant's railway laid in said county of San Louis Obispo and so alleged to have been assessed, were 5.45 or any other number of miles.

IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said county of San Luis Obispo a statement showing the length of the main track of defendant's railway within said county, nor a description of the whole or any of defendant's railway track within said county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock, or any of them, of defend-
140 ant's railway in said State, nor the amount apportioned to said county of San Luis Obispo, and denies that said alleged description in said alleged statement of defendant's railway track, including its right of way in said county, was the same as that given in paragraph III of said tenth count of said complaint.

V.

Defendant denies that thereafter and prior to the first Monday in October, 1887, or at any other time, the county auditor of said county did enter said statement of said board on the assessment-roll of said county; denies that he entered upon said assessment-roll of said county the said amount of said alleged assessment alleged to have been apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation, or elsewhere; denies that thereafter and on the first Monday in October, 1887, or at any other time, the board of supervisors of said county did make or cause to be entered in the proper or other record book or books an order stating or declaring the said alleged length of main track of defendant's railway alleged to have been assessed by said State board of equalization within said county, nor the alleged assessed value per mile of such railway in said county, nor the number of miles of track, nor the alleged assessed value of said railway lying in said county as alleged to have been fixed by said State board of equalization.

141 VI.

Defendant denies that thereafter and on the first Monday of October, 1887, or at any other time, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant alleged to have been assessed and apportioned to said county as aforesaid, and denies that the alleged tax so alleged to have been levied for the purposes of said alleged county taxation for the fiscal year ending June 30, 1888, upon said property of defendant alleged to have been assessed and apportioned to said county as aforesaid was the sum of $934.14, or any other sum.

VII.

Defendant denies that said alleged tax ever was a tax or became or was delinquent on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time, or that it ever became delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county, or otherwise, or was ever charged to the collector of taxes, or any other State or county official, as a delinquent tax to be by him collected, and denies that upon or at the time of or by reason of such alleged delinquency five per cent. of said tax, to wit, the sum of $46.70, or any other per cent. or sum, was by the controller of said State added to said tax.

142 VIII.

Defendant denies that prior to the third Monday of October, 1887, or at any other time, the said State board of equalization did prepare or transmit to the controller of said State a duplicate or other record of assessment of railways, or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888, and denies that the same was certified to by the chairman and clerk of said State board of equalization, and denies that said alleged duplicate records included the said alleged assessments of defendant's said property, nor the said alleged apportionment of the alleged assessment of defendant's property to the county of San Luis Obispo.

VIII A.

Defendant denies that it is a corporation duly or otherwise organized or existing under the laws of the State of California, for the purpose of constructing railroads, or carrying on the business of railroading in said State, except as hereinafter specially set out.

As to plaintiff's eleventh alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State, for the purposes of State and county taxation, or otherwise, for the fiscal
143 year ending June 30, 1888, did assess to defendant then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railroad, then situated and being within said State, in the sum of sixteen million five hundred thousand dollars, or any other sum.

II.

As to each and every allegation contained in the third paragraph of said eleventh count of said complaint, defendant says it has no knowledge or information sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment, or any assessment described as alleged in said third para-

graph of said eleventh count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did apportion the said total alleged assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant, or any of them, to the counties in said State, or any of them, in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged to have been apportioned by said board to the county of San Mateo
144 was the sum of $405,104.00, or any other sum, and denies that the number of miles of defendant's railway laid in said county of San Mateo, and so alleged to have been assessed, were 25.10, or any other number of miles.

IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said county of San Mateo, a statement showing the length of the main track of defendant's railway within said county, nor a description of the whole or any of defendant's railway track within said county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railway in said State, nor the amount apportioned to said county of San Mateo, and denies that said alleged description in said alleged statement of defendant's railway track, including its right of way in said county, was the same as that given in paragraph III of said eleventh count of said complaint.

V.

Defendant denies that thereafter, and prior to the first Mon-
day in October, 1887, or at any other time, the county
145 auditor of said county did enter said statement of said board on the assessment-roll of said county; denies that he entered upon said assessment-roll of said county the said amount of said alleged assessment alleged to have been apportioned by said State board of equalization to said county, in the column of the said county assessment-roll, which showed the total value of all property of said county for taxation, or elsewhere; denies that thereafter, and on the first Monday in October, 1887, or at any other time, the board of supervisors of said county did make or cause to be entered in the proper or other record book or books, an order stating or declaring the said alleged length of main track

of defendant's railway, alleged to have been assessed by said State board of equalization within said county, nor the alleged assessed value per mile of such railway in said county, nor the number of miles of track, nor the alleged assessed value of said railway lying in said county, as alleged to have been fixed by said State board of equalization.

VI.

Defendant denies that thereafter and on the first Monday of October, 1887, or at any other time, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant alleged to have been assessed and apportioned to said county as aforesaid, and denies that the alleged tax so alleged to have been levied for the pur-
146 poses of said alleged county taxation for the fiscal year ending June 30, 1888, upon said property of defendant alleged to have been assessed and apportioned to said county as aforesaid, was the sum of $3,208.42, or any other sum.

VII.

Defendant denies that said alleged tax ever was a tax or became or was delinquent on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time, or that it ever became delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county, or otherwise, or was ever charged to the collector of taxes, or any other State or county official, as a delinquent tax to be by him collected, and denies that upon or at the time of or by reason of such alleged delinquency five per cent. of said tax, to wit, the sum of $160.42, or any other per cent. or sum, was by the controller of said State added to said tax.

VIII.

Defendant denies that prior to the third Monday of October, 1887, or at any other time, the said State board of equalization did prepare or transmit to the controller of said State a duplicate or other record of assessment of railways, or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888, and denies that the same was certified to by the chairman and clerk of said State board of equalization, and denies that said alleged duplicate records included the said alleged
147 assessments of defendant's said property nor the said alleged apportionment of the alleged assessment of defendant's property to the county of San Mateo.

VIII A.

Defendant denies that it is a corporation duly or otherwise organized or existing under the laws of the State of California, for the purpose of constructing railroads or carrying on the business of railroading in the said State, except as hereinafter specially set out.

As to plaintiff's twelfth alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State, for the purposes of State and county taxation, or otherwise, for the fiscal year ending June 30, 1888, did assess to defendant then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock or any of them, of defendant's railroad, then situated and being within said State in the sum of sixteen million five hundred thousand dollars, or any other sum.

II.

As to each and every allegation contained in the third paragraph of said twelfth count of said complaint, defendant says it has no knowledge or information sufficient to enable it to answer,
148 and therefore denies that said property was in or by said alleged assessment or any assessment described as alleged in said third paragraph of said twelfth count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887 or at any other time, said State board of equalization did apportion the said total alleged assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant, or any of them, to the counties in said State or any of them in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged to have been apportioned by said board to the county of Santa Clara was the sum of $957,078.00, or any other sum, and denies that the number of miles of defendant's railway laid in said county of Santa Clara and so alleged to have been assessed were 59.30, or any other number of miles.

IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said county of Santa Clara a statement showing the length of the main track of defendant's railway
149 within said county, nor a description of the whole or any of defendant's railway track within said county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railway in said State, nor the amount apportioned to said

county of Santa Clara, and denies that said alleged description in said alleged statement of defendant's railway track, including its right of way in said county, was the same as that given in paragraph III of said twelfth count of said complaint.

V.

Defendant denies that thereafter and prior to the first Monday in October, 1887, or at any other time, the county auditor of said county did enter said statement of said board on the assessment-roll of said county; denies that he entered upon said assessment-roll of said county the said amount of said alleged assessment alleged to have been apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation, or elsewhere; denies that thereafter and on the first Monday in October, 1887, or at any other time, the board of supervisors of said county did make or cause to be entered in the proper or other record book or books an order stating or declaring the said alleged length of main track of defendant's railway alleged to have been assessed by said State board of equalization within said county, nor the alleged assessed value per mile of such railway in said county, nor the number of miles of track nor the alleged assessed value of said railway lying in said county, as alleged to have been fixed by said State board of equalization.

150

VI.

Defendant denies that thereafter and on the first Monday of October, 1887, or at any other time, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant alleged to have been assessed and apportioned to said county as aforesaid, and denies that the alleged tax so alleged to have been levied for the purposes of said alleged county taxation for the fiscal year ending June 30, 1888, upon said property of defendant alleged to have been assessed and apportioned to said county as aforesaid was the sum of $5,395.24, or any other sum.

VII.

Defendant denies that said alleged tax ever was a tax or became or was delinquent on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time, or that it ever became delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county, or otherwise, or was ever charged to the collector of taxes, or any other State or county official, as a delinquent tax to be by him collected, and denies that upon or at the time of or by reason of such alleged delinquency five per cent. of said tax, to wit: the sum of $269.76, or any other per cent. or sum, was by the controller of said State added to said tax.

151

VIII.

Defendant denies that prior to the third Monday of October, 1887, or at any other time, the said State board of equalization did prepare or transmit to the controller of said State, a duplicate or other record of assessment of railways or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888, and denies that the same was certified to by the chairman and clerk of said State board of equalization, and denies that said alleged duplicate records included the said alleged assessments of defendant's said property, nor the said alleged apportionment of the alleged assessment of defendant's property to the county of Santa Clara.

VIII A.

Defendant denies that it is a corporation duly or otherwise organized or existing under the laws of the State of California for the purpose of constructing railroads or carrying on the business of railroading in the said State, except as hereinafter specially set out.

152 As to plaintiff's thirteenth alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State, for the purposes of State and county taxation, or otherwise, for the fiscal year ending June 30, 1888 did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railroad then situated and being within said State in the sum of sixteen million five hundred thousand dollars, or any other sum.

II.

As to each and every allegation contained in the third paragraph of said thirteenth count of said complaint defendant says it has no knowledge or information sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment, or any assessment, described as alleged in said third paragraph of said thirteenth count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did apportion the said total alleged assessment of the fran-
153 chise, roadway, road-bed, rails and rolling stock of defendant, or any of them, to the counties in said State, or any of them in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged

to have been apportioned by said board to the county of Santa Cruz was the sum of $34,700.00, or any other sum, and denies that the number of miles of defendant's railway laid in said county of Santa Cruz, and so alleged to have been assessed, were 2.15, or any other number of miles.

IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said county of Santa Cruz a statement showing the length of the main track of defendant's railway within said county, nor a description of the whole or any of defendant's railway track within said county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railway in said State, nor the amount apportioned to said county of Santa Cruz, and denies that said alleged description
154 in said alleged statement of defendant's railway track, including its right of way in said county, was the same as that given in paragraph III of said thirteenth count of said complaint.

V.

Defendant denies that thereafter, and prior to the first Monday in October, 1887, or at any other time, the county auditor of said county did enter said statement of said board on the assessment-roll of said county; denies that he entered upon said assessment-roll of said county the said amount of said alleged assessment alleged to have been apportioned by said State board of equalization to said county, in the column of the said county assessment-roll which showed the total value of all property of said county for taxation, or elsewhere; denies that thereafter and on the first Monday in October, 1887, or at any other time, the board of supervisors of said county did make or cause to be entered in the proper or other record book or books an order stating or declaring the said alleged length of main track of defendant's railway alleged to have been assessed by said State board of equalization within said county, nor the alleged assessed value per mile of such railway in said county, nor the number of miles of track, nor the alleged assessed value of said railway lying in said county as alleged to have been fixed by said State board of equalization.

VI.

Defendant denies that thereafter and on the first Monday
155 of October, 1887, or at any other time, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant alleged to have been assessed and apportioned to said county as

aforesaid, and denies that the alleged tax so alleged to have been levied for the purposes of said alleged county taxation for the fiscal year ending June 30, 1888, upon said property of defendant alleged to have been assessed and apportioned to said county as aforesaid, was the sum of $406.68, or any other sum.

VII.

Defendant denies that said alleged tax ever was a tax or became or was delinquent on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time, or that it ever became delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county or otherwise, or was ever charged to the collector of taxes or any other State or county official, as a delinquent tax to be by him collected, and denies that upon or at the time of or by reason of such alleged delinquency five per cent. of said tax, to wit, the sum of $20.33, or any other per cent. or sum, was by the controller of said State added to said tax.

VIII.

Defendant denies that prior to the third Monday of October, 1887, or at any other time, the said State board of equalization did prepare or transmit to the controller of said State a duplicate or
156 other record of assessment of railways or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888, and denies that the same was certified to by the chairman and clerk of said State board of equalization, and denies that said alleged duplicate records included the said alleged assessments of defendant's said property, nor the said alleged apportionment of the alleged assessment of defendant's property to the county of Santa Cruz.

VIII A.

Defendant denies that it is a corporation duly or otherwise organized or existing under the laws of the State of California, for the purpose of constructing railroads or carrying on the business of railroading in the said State, except as hereinafter specially set out.

As to plaintiff's fourteenth alleged cause of action defendant says:

I.

Defendant denies that on the 13th day of August, 1887, or at any other time, the State board of equalization of said State for the purposes of State and county taxation, or otherwise, for the fiscal year ending June 30, 1888, did assess to defendant, then the owner and operator thereof in more than one county in said State, the franchise, roadway, road-bed, rails and rolling stock, or any of them, of defendant's railroad, then situated and being within said State in the sum of sixteen million five hundred thousand dollars, or any other sum.

157 II.

As to each and every allegation contained in the third paragraph of said fourteenth count of said complaint, defendant says it has no knowledge or information sufficient to enable it to answer, and therefore denies that said property was in or by said alleged assessment or any assessment described as alleged in said third paragraph of said fourteenth count of said complaint, and denies each and every allegation therein contained.

III.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did apportion the said total alleged assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant, or any of them, to the counties in said State, or any of them in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties, or otherwise; denies that the amount of said total alleged assessment alleged to have been apportioned by said board to the county of Tulare was the sum of $1,008,402.00, or any other sum, and denies that the number of miles of defendant's railway laid in said county of Tulare, and so alleged to have been assessed, were 62.48, or any other number of miles.

158 IV.

Defendant denies that within ten days after the third Monday in August, 1887, or at any other time, said State board of equalization did transmit to the county auditor of said county of Tulare a statement showing the length of the main track of defendant's railway within said county, nor a description of the whole or any of defendant's railway track within said county, nor the right of way sufficient for identification; denies that said alleged statement showed the alleged assessed value per mile of the same as alleged to have been fixed by said alleged *pro rata* distribution per mile of the said alleged assessed value of the whole franchise, roadway, road-bed, rails and rolling stock or any of them of defendant's railway in said State, nor the amount apportioned to said county of Tulare, and denies that said alleged description in said alleged statement of defendant's railway track including its right of way in said county was the same as that given in paragraph III of said fourteenth count of said complaint.

V.

Defendant denies that thereafter and prior to the first Monday in October, 1887, or at any other time, the county auditor of said county did enter said statement of said board on the assessment-roll of said county; denies that he entered upon said assessment-roll of said county the said amount of said alleged assessment alleged to have been apportioned by said State board of equalization to said

county, in the column of the said county assessment-roll which showed the total value of all property of said county for
159 taxation, or elsewhere; denies that thereafter and on the first Monday in October, 1887, or at any other time, the board of supervisors of said county did make or cause to be entered in the proper or other record book or books an order stating or declaring the said alleged length of main track of defendant's railway alleged to have been assessed by said State board of equalization within said county, nor the alleged assessed value per mile of such railway in said county, nor the number of miles of track, nor the alleged assessed value of said railway lying in said county, as alleged to have been fixed by said State board of equalization.

VI.

Defendant denies that thereafter and on the first Monday of October, 1887, or at any other time, the board of supervisors of said county did levy the county taxes upon the taxable property of said county, including the property of defendant alleged to have been assessed and apportioned to said county as aforesaid, and denies that the alleged tax so alleged to have been levied for the purpose of said alleged county taxation for the fiscal year ending June 30, 1888, upon said property of defendant alleged to have been assessed and apportioned to said county as aforesaid was the sum of $10,003.35, or any other sum.

VII.

Defendant denies that said alleged tax ever was a tax or
160 became or was delinquent on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time, or that it ever became delinquent; denies that the same was ever placed on any list of delinquent taxes, State or county or otherwise, or was ever charged to the collector of taxes, or any other State or county official, as a delinquent tax to be by him collected, and denies that upon or at the time of or by reason of such alleged delinquency five per cent. of said tax, to wit, the sum of $500.16, or any other per cent. or sum, was by the controller of said State added to said tax.

VIII.

Defendant denies that prior to the third Monday of October, 1887, or at any other time, the said State board of equalization did prepare or transmit to the controller of said State a duplicate or other record of assessment of railways or a duplicate or other record of apportionment of railway assessments for the fiscal year ending June 30, 1888, and denies that the same was certified to by the chairman and clerk of said State board of equalization, and denies that said alleged duplicate records included the said alleged assessments of defendant's said property, nor the said alleged apportionment of the alleged assessment of defendant's property to the county of Tulare.

VIII A.

Defendant denies that it is a corporation duly or otherwise organized or existing under the laws of the State of California,
161 for the purpose of constructing railroads or carrying on the business of railroading in the said State, except as hereinafter specially set out.

And for a further and separate affirmative answer to each and every count and cause of action in said complaint contained:

I.

Defendant refers to and makes part hereof all matters and things stated in the preceding paragraphs of its foregoing answer herein.

II.

Defendant a Corporation—Its Place of Business—Line of Road—Stockholders.

The defendant is a corporation existing under the laws of the United States and of the State of California (as will hereafter more fully appear). The principal place of business of defendant now is, and for many years last past has been, in the city of San Francisco, State of California. Some of its stockholders and members now are, and ever have been, citizens of the United States, resident in said State of California; and some of its stockholders and members now are and ever have been citizens of the United States, resident in States other than the State of California. In the year 1868, it was duly organized under an act of the legislature of the State of California, approved May 20th, 1861, entitled, "An act to provide for the incorporation of railroad companies and the manage-
162 ment of the affairs thereof, and other matters relating thereto," and the term of its existence was fixed at fifty years from the date of its organization; and it is still a corporation duly organized under said law, except in so far as its organization, existence and character may be affected or modified by the Federal statutes hereinafter referred to.

III.

S. P. R. R.—The Uses and Purposes Thereof.

As such corporation it constructed and acquired its several lines of railroad, and procured the rolling stock and all appurtenances thereunto belonging, known and designated as the Southern Pacific railroad (of California), described as follows: Commencing on the waters of the Pacific ocean in the city and county of San Francisco, and extending in a southerly direction through portions of the county of San Francisco, and through the county of Santa Clara to Tres Pinos in the county of San Benito, with a branch therefrom, running from Carnadero, in the county of Santa Clara, to a point near San Miguel, in the county of San Luis Obispo. Said line of

railroad also extends from Huron, in Fresno county, to Goshen, in Tulare county, and thence in a southerly direction by way of Tehachapi pass, Mojave and Los Angeles, to the Colorado river at Fort Yuma, with three branches from said line at Los Angeles, extending respectively to Santa Monica, San Pedro and Santa Ana, in the county of Los Angeles. Said line of railroad is connected
163 with the Texas & Pacific railroad at Sierra Blanca in the State of Texas, by three railroads, to wit, the Southern Pacific railroad (of Arizona), extending from Fort Yuma to the eastern boundary line of Arizona, the Southern Pacific railroad (of New Mexico), extending from said eastern boundary line across New Mexico, to the western boundary of Texas, and the Galveston, Harrisburg and San Antonio railroad, extending from said last-named boundary to Sierra Blanca. Said several railroads are operated as one continuous line from a point near Marshall, in Texas, to the Pacific ocean at San Francisco, for the uses and purposes and in the manner contemplated by the acts of Congress hereinafter referred to.

From Tres Pinos to Huron the said Southern Pacific railroad has not been completed, but pending its construction, connection between said points is made over the lines of the Central Pacific railroad. Defendant has completed the construction of the road from said Southern Pacific railroad to the Colorado river, at or near The Needles, connecting with the Atlantic & Pacific railroad, hereinafter referred to, and with the said Atlantic & Pacific, making a continuous line from Springfield, in the State of Missouri, to the Pacific ocean, as contemplated by the act of Congress hereinafter referred to chartering the Atlantic & Pacific Railroad Company.

IV.

Length of the Road in the Several Counties.

Of said Southern Pacific railroad (of California) there had
164 been, prior to the first Monday in March, 1880, completed, and there was in operation in the several counties through which it runs, 1,022.33 miles, to wit: In the city and county of San Francisco, 7.36 miles; in the county of San Mateo, 25.10 miles; in the county of Santa Clara, 59.30 miles; in the county of Santa Cruz, 2.15 miles; in the county of San Benito, 17.65 miles; in the county of Monterey, 109.14 miles; in the county of Fresno, 17.43 miles; in the county of Tulare, 62.48 miles; in the county of Kern, 35.64 miles; in the county of Los Angeles, 142.48 miles; in the county of San Bernardino, 206.87 miles; and in the county of San Diego, 158.85 miles; in the county of San Luis Obispo, 5.45 miles, and all within the State of California.

V.

Act of Congress of July 27th, 1866—Atlantic and Pacific Act.

On the 27th day of July, 1866, the Government of the United States undertook to construct, or cause to be constructed, a line of

railroad from a point at or near the town of Springfield, in the State of Missouri, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as might be found suitable for a railroad route to the Colorado river, at such point as might be selected; and thence by the most practicable and eligible route to the Pacific ocean; and to that end Congress passed an act entitled, "An act granting lands to aid in the construction of
165 a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," which act was approved on said 27th day of July, 1866, and to said act defendant here refers by title and makes it part of this answer. (See United States Statutes at Large, vol. 14, page 292.) By said act certain persons therein named were made and erected into a corporation, under the name and style of the "Atlantic & Pacific Railroad Company."

VI.

Intent of Congress in Passing Act of 1866.

The intent and purpose of Congress in passing said act was to secure the completion of a railroad from the Missouri river to the Pacific ocean, with a branch to San Francisco, and to secure the use thereof for all time to come to the Government of the United States for the transportion of its mails, troops, munitions of war and public stores.

VII.

Like Privileges and Immunities Granted to Defendant.

To facilitate the construction of said road, the Government of the United States, by said act of Congress, adopted the defendant as the instrument or agent of the United States, and conferred upon defendant the same powers, and clothed defendant with the same privileges and immunities which it conferred upon and clothed
166 the Atlantic & Pacific Railroad Company with, except that the said defendant was to construct only that portion of said railroad between the Colorado river and the city and county of San Francisco.

VIII.

Acceptance of the Conditions.

Said Atlantic and Pacific Railroad Company organized under said act and obtained *bona fide* subscriptions to the stock of said company to the amount of one million dollars, with ten per centum paid within two years after the passage and approval of said act of Congress; and said company and defendant, immediately after the passage of said act, accepted the terms and conditions thereof, and have duly complied therewith.

IX.

Roads Constructed under said Act.

Said Atlantic & Pacific Company has fully completed the whole of said road from Springfield to the Colorado river; and defendant has constructed said road as aforesaid to Mojave, and from said Mojave to a junction with the road of the Atlantic & Pacific Company to the Colorado river.

X.

Act of Congresss of March 3d, 1871—Texas Pacific Act.

On the 3d day of March, 1871, the Government of the United States undertook to construct, or cause to be constructed, a
167 line of railroad from Marshall, in the State of Texas, to San Diego, in the State of California, and from said line of road at the Colorado river to construct, or cause to be constructed, a line of railroad which would connect the road from Marshall to San Diego with the line of road provided for in the act of Congress of July 27th, 1866, hereinbefore referred to, and by means of said connecting road to connect the road from Marshall to San Diego with the city of San Francisco; and to that end Congress passed an act entitled, "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3d, 1870, and subsequently, on the 2d day of May, 1872, passed an act entitled, "An act supplementary to an act entitled An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3d, 1871. To said acts defendant here refers by title, and makes them part of this answer. (See vol. 16, U. S. Statutes at Large, 573; vol. 17, *id.*, 59.)

XI.

Provisions of said Acts Accepted by the Texas Pacific Railroad Company and by Defendant—Their Work Thereunder.

Immediately after the passage of said act of March, 1871, the Texas Pacific Railroad Company was organized in pursuance thereof, and it and defendant accepted all the terms and con-
168 ditions of each of said acts of 1871 and 1872, and have fully and in every respect complied therewith, and under them and in compliance with the spirit and intent of said acts have completed the roads mentioned in the third subdivision of paragraph X of this answer.

XII.

Intent of Congress in Passing the Acts of 1871 and 1872.

The purpose of Congress in passing said acts was to insure the transportation of the mails, troops, munitions of war, supplies and stores of the United States, and to that end Congress expressly de-

clared in said acts that no act of said companies, or either of them, nor any law of any State or Territory should ever impede, delay or prevent said companies, or either of them, from performing their obligations to the United States in that regard.

XIII.

The State of California Confirms and Vests in the Southern Pacific Railroad Company the Rights, Privileges, Franchises, Power, and Authority Granted to or Vested in said Company by the Several Acts of Congress.

On the 4th day of April, 1870, the legislature of the State of California passed an act entitled, "An act to aid in giving effect to an act of Congress relative to the Southern Pacific Railroad Company." By the terms of said act, and to enable said company to comply with the act of Congress of July 27th, 1866, hereinbefore pleaded, and all other acts of Congress then in force, or which might thereafter be enacted, it was provided that the right to construct, maintain and operate by steam or other power the said railroad mentioned in said acts of Congress, and all the rights, privileges, franchises, power and authority conferred upon or granted to or vested in said company by the said acts of Congress, and any acts of Congress which might thereafter be enacted, should be confirmed and vested in the defendant. Said act now is, and ever since said 4th day of April, 1870, has been, in full force and effect (Statutes 1870, p. 883).

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XIV.

Indebtedness of Defendant Secured by Mortgage.

On the first day of April, 1875, the defendant was indebted to diverse persons, citizens of the United States, and many of them then and now citizens and *bona fide* residents of the State of California, in large sums of money advanced to construct and equip the railroad hereinbefore described. To secure the payment of such indebtedness, the defendant, on the first day of April, 1875, executed and delivered a mortgage upon said Southern Pacific railroad, its franchises and all rolling stock and appurtenances, and upon a large number of tracts of land, aggregating over eleven million of acres, situated in different counties in the State of California, which said tracts of land then were and ever since have been the property of defendant. Said indebtedness amounts to the sum of forty-six million of dollars, and no part thereof has ever been paid except the accruing interest, and the whole thereof is now and since the execution of said mortgage has been a valid and subsisting indebtedness against said company, and has been and still is secured by said mortgage, a copy of which, with the endorsements thereon, is hereunto annexed and made a part hereof, marked Exhibit "A."

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XV.

Mortgaged Lands—Mode and Manner of Assessment—Payment of Taxes.

The lands mentioned in the preceding subdivision are not, and never have been, in any way connected with the railroad business of the defendant. They are agricultural and grazing lands, held, owned and used for farming and grazing purposes, and are situated as follows in the counties of the State of California and are distributed in the respective counties in the following quantities: In Santa Clara county, 3,138 acres; San Benito county, 1,879 acres; Monterey county, 1,879 acres; Stanislaus county, 32,242 acres; Merced county, 20,655 acres; Fresno county, 18,789 acres; Tulare county, 260,315 acres; Kern county, 168,096 acres; Los Angeles county, 38,033 acres; San Bernardino county, 30,686 —; San Diego county, 5,787 acres.

Said lands and all of them for each of the years 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887 and 1888 were assessed by the assessors of the respective counties in which they are situated at
171 their full cash value, and no deduction from said value was made or allowed on account of said mortgage or the indebtedness secured thereby; on the contrary, the laws of the State of California, under which said assessors acted in making said assessments, prohibited any deduction from said values on account either of the mortgages or the indebtedness secured thereby.

In each of said years the defendant paid in full, at the time the same became payable, all the taxes levied upon said lands, amounting in the aggregate for State, county and municipal purposes, to $—.

The laws of the State of California, then and ever since in force, provide that in the assessment and valuation of lands of like character and situation, and in every respect similar both in quality and use, not owned by railroad or other quasi-public corporations, a mortgage thereon by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, and that in the assessment and valuation of such property for the purposes of taxation, the value of said mortgages shall be deducted therefrom, and the owner of said lands or property only assessed and taxed for the value in excess of the value of the mortgage.

To assist the assessor in the performance of his duties, and to enable him to make the deductions aforesaid, the laws of the State of California make it the duty of the recorder of each county,
172 annually, on or before the first Monday in April, to transmit to the assessor a complete abstract of all mortgages by which any debt is secured remaining unsatisfied on the records of his office at 12 o'clock meridian, on the first Monday of March of said year; and it is further provided by said laws that should any such list be found to contain any instrument relating to lands situated in more than one county, it shall be the duty of the assessor to trans-

mit to the State board of equalization all information relating thereto, and it shall be the duty of the State board to attach an apportionment of valuation of such instrument to be assessed in each county, and to transmit to the assessor of each county mentioned as affected in said instrument a statement of valuation of assessment to be levied against said instrument in such county (Political Code, sec. 3678).

In the matter of the valuation of its said lands for the purposes of taxation, the defendant is and ever has been deprived of all the benefits of the said laws which provide for the deduction of indebtedness secured by mortgage from the valuation of lands by reason of the provisions of section 4 of article XIII of the constitution of the State of California, and the action of assessors in pursuance thereof; while all natural persons and all corporations, not quasi-public, within the State of California, are entitled to receive, and do receive, the full benefit of said laws, and the deductions required to be made thereunder.

173 XVI.

Assessment by State Board of Equalization.

On the 13th day of August, 1887, the State board of equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section 10 of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails and rolling stock of said railroad against defendant. Said pretended assessment was not made separately upon the franchise, roadway, road-bed, rails and rolling stock, or any properties of said railroad, but all of said properties were blended together in making said assessment, which assessment was then and there so entered upon the minutes of said board. Said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based; and no other assessment than the aforesaid was ever made of said property, or any part thereof, for said fiscal year.

XVII.

Failure of State Board to Transmit Assessment.

The State board of equalization never did at any time transmit said pretended assessment, or any assessment of said property, or any part thereof, to the assessor or to any of the authorities of said counties, and never, at any time, caused the same to be
174 entered upon the assessment-roll of said counties for said fiscal year, or for any other year, nor has said pretended assessment, or any part thereof, or any assessment against said defendant, or said property, or any part thereof, ever been entered upon or made part of any assessment roll, book or delinquent list, in or for said counties.

XVIII.

State Board Never Apportioned Assessment.

Defendant avers upon its information and belief that neither said pretended assessment nor any assessment against defendant in respect to said property, or any part thereof, was ever entered upon any assessment roll or book of said county or counties, or upon any delinquent list of said county or counties, nor was any entry relative to the action of said State board of equalization in respect to the assessment or apportionment of said property, or any part thereof, ever entered upon said assessment roll or book, except a letter from the purported chairman of the State board of equalization, addressed to the assessor of said counties, which letter did not contain said assessment or any part thereof, nor a copy of said assessment, or any part thereof, nor did it contain any apportionment thereof, as provided for in section 10 of article XIII of the constitution of the State of California, hereinbefore referred to or otherwise.

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XIX.

No Assessment Was Ever Made or Entered on the Assessment-roll.

Defendant, upon information and belief, avers that neither said pretended assessment nor any assessment against this defendant, or any other person or persons, in respect to the said property, or any part thereof, was ever entered upon any assessment roll or book of said county or counties, nor upon any delinquent list of said county or counties, nor was any such delinquent list ever published; nor was any entry relative to the action of said State board of equalization in respect to the assessment or apportionment of said property of defendant, or any part thereof, ever entered upon said assessment roll or rolls, or book or books, except the said letter of the said State board of equalization. Said letter was copied by the assessors of said counties on or about the — day of August, 1887, upon the assessment. Upon said assessment-roll opposite said letter is entered in figures $—, and opposite said figures, under the head of taxes due, is entered in figures, $—. As defendant is informed and believes, and upon such information and belief, charges the truth and fact to be, there are in respect to the said property and in respect to defendant, no other or further entries upon any assessment roll, book or delinquent list of said counties.

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XX.

State Board Pretended to Assess the Whole of said Property to Defendant.

The State board of equalization, in making the said pretended assessment, pretended to assess to and against defendant the full cash value of said railroad, roadway, road-bed, rails, rolling stock and franchises, without deducting therefrom the value of the mortgage, or any part thereof, given and existing thereon as aforesaid,

to secure the indebtedness of said company to the holders of said bonds, notwithstanding, as defendant avers, they had full knowledge of the existence of such mortgage.

XXI.

State Board Did Not Treat said Mortgage as an Interest in the Property.

In making said pretended assessment the said State board of equalization did not deem or treat said mortgage as an interest in said property, but did assess the whole value of said property to the defendant in the same manner it would have done had there been no mortgage thereon.

XXII.

Authority Exercised by State Board Violates Provisions of Fourteenth Amendment.

Under the constitution of the State of California, the board of supervisors of the several counties of the State constitute boards of equalization for their respective counties, whose duty it is
177 to equalize the valuation of the taxable property in the county, except the franchise, roadway, road-bed, rails and rolling stock of railroads operated in more than one county of the State; and to such boards the owners of all property, except as above stated, have the right and privilege to apply for the correction of their assessments, and have the right and privilege of a hearing before the said local boards of equalization. By the provisions of the constitution of California, and the laws in pursuance thereof, this right and privilege, or any right or privilege, to be heard in relation to assessments, is denied to defendant in respect to the property in question. All of which defendant avers is contrary to the provision of the fourteenth amendment of the Constitution of the United States, which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

XXIII.

Further Violation of the Fourteenth Amendment.

The power conferred upon the State board of equalization by section ten of article XIII of the constitution of California, violates the provision of the fourteenth amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty or property, without due process of law; for that said section, as to such power, is self-executing and complete, and does not provide for personal or other notice to be given to the parties to be affected by the exercise of such
178 power; and does not provide for a full or any opportunity of time, place or tribunal for such parties to be heard in defense of their rights; and hence, under and by said provision of the constitution of the State of California, the liability of owners of

such property to taxation, and the amount thereof, may be fixed without notice to them or an opportunity to be heard.

XXIV.

Further Discrimination.

The provisions of section four of the constitution of the State of California, providing for the assessment of the property of rail-railroad and other quasi-public corporations, is in contravention of the provisions of said fourteenth amendment of the Constitution of the United States, in that it discriminates against such corporations; in this, that whereas, under said section four of said article XIII of the constitution of the State of California, if the property of natural persons or corporations, not quasi-public, has a mortgage, lien or encumbrance thereon, they are not liable to assessment or taxation upon such property, but only upon the value of their interest in such property over and above the value of such mortgage, lien or encumbrance; whereas, in the case of the property of railroad and other quasi-public corporations, no such allowance or deduction is made, had or allowed with respect to any mortgage, lien or encumbrance there may be upon such property; and also in this, that while the tenth section of article XIII of the con-
179 stitution of the State of California provides the same mode for the assessment of the franchises, roadway, road-bed, rails and rolling stock of all railroads operated in more than one county, whether such property be owned by railroad or other quasi-public corporations, or by private corporations, or by natural persons, yet section 4 of article XIII of said constitution permits or allows indebtedness secured by mortgage, trust deed or otherwise to be deducted from the value of such property only when it is owned by natural persons or corporations not quasi-public, and denies such deduction when the property is owned by railroad or other quasi-public corporations.

XXV.

Section 10 of article XIII of said constitution of California provides that all property except the franchise, roadway, road-bed, rails and rolling stock of all railroads operated in more than one county in the State, shall be assessed in the county, city, city and county, town, township or district in which it is situated, in the manner prescribed by law.

The laws of said State prescribe that all property, except that above mentioned, shall be assessed in the county in which it is situated by an assessor elected by the people of such county.

Said assessors for each of said years have assessed to the owners and holders thereof in their respective counties the indebtedness of the defendant secured by the mortgage herein mentioned,
180 but never have, nor does the law permit them so to do, made any deduction from the assessment of any of the property of this defendant on account of the assessments made as aforesaid to the holders of such indebtedness.

XXVI.

Further Discrimination.

All owners of railroad property, operated in more than one county, by virtue of said section 10 of article XIII, are denied any protection from the laws of the State of California, which—

(*a.*) Require that property shall be taxed in proportion to its value.

(*b.*) Require such proportions to be ascertained by a general law.

(*c.*) Require that before liability be fixed an opportunity to be heard must be given.

(*d.*) Give an appeal from the assessor to boards of equalization.

(*e.*) Require the assessment to be made in the county, and prohibit its being made in localities distant from the situs of the property.

(*f.*) Which prescribe mode and manner of the assessment.

And defendant avers that at and before and ever since the adoption of the constitution of California, now in force, there were and are existing under the laws of said State, corporations of various kinds, formed for the purpose of and actually operating and doing business and holding and using and operating property in more
181 than one county in said State, and that at all of said times there were and there are now diverse natural persons, residents of said State, operating property in more than one county in said State, and that at all of said times there were and now are railroads owned by corporations formed under the general laws of said State, and also by natural persons, which are only operated in one county. That by the provisions of section 10 of article XIII of said State constitution, persons operating railroads in more than one county in the State have been singled out from all other persons operating property in more than one county, and denied the right, common to all other persons, to appeal for relief from overvaluations of their property by assessors to the local board of equalization, and denied the rights and privileges accorded by the laws to all other persons in that respect.

Corporations in said State of California now are and ever have been formed under general laws relating thereto, and railroad and all other corporations, except public corporations, formed or organized for the government of a portion of the State, now are and ever have been designated by the laws of California as private corporations. Under the provisions of the laws relating to the formation of private corporations such corporations may be formed for any purpose for which individuals or natural persons may lawfully associate themselves together; and there now exist in California, and ever have existed, corporations formed under said laws for fire, ma-
rine, mutual life, health and accident insurance; building,
182 constructing and operating railroads, wagon roads, telegraphs, bridges, ferries, wharves, chutes and piers, and for constructing and operating canals, for the purposes of acquiring lands, in large tracts, and distributing them as homesteads among the corporators; for savings and loans, for mining, for the sale and

distribution of water in cities and towns, for manufacturing, mechanical and agricultural purposes; for benevolent, charitable and educational purposes, for cemeteries, agricultural fairs, and various other purposes.

In said State of California there are now and for more than ten years last past have been various railroads owned, operated and controlled either by individuals, partnerships, or by private corporations other than railroad corporations, to wit, by mining and manufacturing corporations. There now is and for more than ten years last past has been a railroad in use and operation extending from the city of Marysville, in the county of Yuba, to the town of Oroville, in the county of Butte, in said State, a distance of twenty-seven miles, which said road now is and ever has been operated in more than one county in this State, and is of the same gauge as the road of this defendant, and has ever been operated for like uses and purposes.

Said road, with all its equipments, now is, and for more than ten years last past, has been in the ownership and under the operation and control of one N. D. Rideout, a citizen of the United States and resident of the State of California.

183 There now are, and for more than ten years last past have been, divers other railroads owned and operated in said State by corporations other than railroad corporations, and by individuals and partnerships, and that all of said corporations, individuals and partnerships are the owners of lands which are assessed by the local assessor of the various counties in which such lands are situated, and all are entitled under the laws of said State to the deductions provided for in said laws, and as said defendant, upon information and belief, avers, have been allowed such deductions.

XXVII.

System Adopted by said Board Violates Rules of Equality.

The State board of equalization in making said pretended assessment of the said roadway of defendant did willfully and designedly include in the valuation of said roadway the value of fences erected upon the land of coterminous proprietors; and did willfully and designedly value the said roadway at a greater value than the value of other property similarly situated and greater than its actual value, upon the ground that such increased valuation should be made because the title of defendant thereto was acquired by condemnation.

The value of such fences, which were not the property of defendant nor the property of the owners of said roadway, and the in-

184 creased value affixed to the roadway by the system adopted by the board, are blended in said pretended assessment, and there is no mode or means by which such illegal valuation can be separated from those which may be legal.

XXVIII.

Defendant's Franchise a Federal One.

And defendant, upon its information and belief, avers that under and by virtue of the said several acts of Congress defendant became, and ever since has been, a Federal corporation, and has held its franchise and exercised all its corporate powers under the Government of the United States.

XXIX.

Corporate Powers in Part Derived from Acts of Congress.

And defendant, upon its information and belief, avers that if, by virtue of the several acts of Congress herein referred to, it did not become a Federal corporation, yet it holds, under the Government of the United States, all the corporate powers and franchises granted to it by the said several acts of Congress as the trustee of the said Government, and for the governmental uses and purposes specified in said acts.

185

XXX.

That the Franchise of Defendant is not Subject to State Taxation.

Under and by virtue of the said several acts of Congress hereinbefore referred to, the defendant was by the Government of the United States selected as the means and instrument of that Government to construct the railroad hereinbefore described, and to keep and maintain the same in repair, to the end that the said Government might, when occasion required, use the same for transportation of its armies and military stores, and for such other purposes as said Government might, in the execution of its powers, desire to use the same. The Government of the United States has never given to the State of California the right to lay any tax upon the franchise, existence or operations of defendant. Such a tax would hinder and impede the lawful operations of the Government of the United States; would hinder, delay and prevent the defendant from performing, as aforesaid, its obligations to the United States, and would nullify and prevent the enforcement of the said several acts of Congress.

XXXI.

Whole Franchise Assessed.

Said pretended assessment made by the State board of equalization is upon all of the franchises of defendant, and the said
186 board, in valuing the same, included the value of all the franchises and corporate powers held and exercised by defendant under said acts of Congress.

XXXII.

Tax upon the Franchise Blended with Tax upon Other Property.

The State board of equalization, in making said pretended assessment, included and assessed the franchises of defendant, and in making said pretended apportionment included in the valuation affixed to the property of defendant the value thereof, but such value is not separately stated in said apportionment nor upon any assessment-roll or delinquent list of said counties, but such value is in said pretended apportionment and upon the assessment-roll, blended with the values affixed to the roadway, road-bed, etc., and cannot on either be distinguished or separated from such other values, and the tax upon said franchise is in like manner blended with and cannot be separated from the tax on said roadway, road-bed, etc.

XXXIII.

Plaintiff's Causes of Action Based upon Assessment by State Board of Equalization.

On the 13th day of August, 1887, the State board of equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section ten of article XIII of the constitution of the State of California, did make a pretended
187 assessment for the purposes of taxation, for the fiscal year of said State then next ensuing, upon the franchise, roadway, road-bed, rails and rolling stock of the railroad hereinbefore described and known as the Southern Pacific railroad against this defendant; that said pretended assessment was not made separately upon the franchise, roadway, road-bed, rails and rolling stock, or any properties, of said railroad, but all of said properties were blended together in making said assessment, which assessment was then and there so entered upon the minutes of said board. Said pretended assessment is the assessment upon which the several taxes mentioned in plaintiff's complaint are claimed to be due, and that no other assessment than such pretended assessment was ever made against or upon said property or any part thereof.

Wherefore defendant prays to be hence dismissed with costs.

H. S. BROWN AND
FOSHAY WALKER,
Attorneys for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss.:*

J. L. Willcutt, being duly sworn, deposes and says: That he is the secretary of The Southern Pacific Railroad Company, defendant in the above-entitled action; that he has read the foregoing answer,
and knows the contents thereof; that the same is true of his
188 own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

J. L. WILLCUTT.

Subscribed and sworn to before me, this 26th day of September, 1892.

[SEAL.] E. B. RYAN,
Notary Public.

"EXHIBIT A."

This indenture, made and entered into this the first day of April, A. D. 1875, by and between the Southern Pacific Railroad Company, a railroad corporation, duly incorporated and organized under and in pursuance of the laws of the State of California, party of the first part, and D. O. Mills and Lloyd Tevis, of the city and county of San Francisco, California, parties of the second part,

Witnesseth: That whereas, the said party of the first part desires to complete the construction and equipment of its railroad and telegraph lines in the State of California, running from the city of San Francisco in a southerly and southeasterly direction by way of Carnadero junction, Salinas valley and Polonio pass to the Colorado river, at or near the "Needles;" also from Carnadero junction to San Benito; also from Los Gatos creek, via Goshen, to the junction with the first-mentioned line between Poso creek and Kern river; also from the junction near Tehachapi pass, via Los Angeles, to the Texas
189 Pacific railroad, near Fort Yuma; and also from Los Angeles to Wilmington on San Pedro bay, aggregating eleven hundred and fifty miles of railroad and telegraph line, and to cancel its present bonded indebtedness for construction secured by a mortgage heretofore made and bearing date November first, eighteen hundred and seventy, and to that end intends and is about to issue its first-mortgage bonds upon said railroad and telegraph line, and its rolling stock, fixtures and franchises, and also upon the lands granted to it by Congress, by the act of Congress entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July twenty-seventh, eighteen hundred and sixty-six, and the act entitled, "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one, not sold or otherwise disposed of prior to the execution of this mortgage, aggregating as near as can be estimated, eleven millions of acres;

And whereas, heretofore, to wit: on the nineteenth day of December, A. D. eighteen hundred and seventy-four, the board of directors of said company, pursuant to the statute of the State of California in such cases made and provided, at a meeting of said board at which all the members thereof were present, did, by a resolu-
190 tion to that effect, which was unanimously adopted and passed, determine and direct that first-mortgage bonds upon said railroad and telegraph line, its rolling stock, fixtures and franchises, and upon said hereinbefore-described lands, to the number of forty-eight thousand (forty-four thousand of which shall be for one thousand dollars each and four thousand of which shall be for

the sum of five hundred dollars each), in seven series, to be designated by the letters of the alphabet, commencing with the letter "A" and followed by the succeeding letters in regular order to the letter "G," both inclusive, be prepared, executed and issued by the president and secretary of said company. Series "A" to consist of thirteen thousand bonds for one thousand dollars each, numbered from one to thirteen thousand, both inclusive, and four thousand bonds for five hundred dollars each, numbered from thirteen thousand and one to seventeen thousand, both inclusive. Series "B" to "F," both inclusive, consisting each of five thousand bonds for one thousand dollars each, numbered from seventeen thousand and one to forty-two thousand, both inclusive, and series "G," consisting of six thousand bonds for one thousand dollars each, numbered from forty-two thousand and one to forty-eight thousand, both inclusive. All of said bonds being payable thirty years after date, with interest at the rate of six per centum per annum, payable semi-annually.

191 The said series "A" to bear date April first, eighteen hundred and seventy-five, and the said several succeeding series to bear such dates respectively as the board of directors of said company may direct; all of said bonds aggregating the sum of forty-six millions of dollars;

And whereas, the said board of directors, at the meeting aforesaid, and in the manner and form, and by the vote aforesaid, did further resolve that the said series "A" of said bonds should be executed and issued in substantially the following form, and that the succeeding series of said bonds should be in a similar form with the necessary changes to conform to said resolutions or orders, which form is as follows, to wit:

THE UNITED STATES OF AMERICA.

$1,000 $1,000

In United States gold coin. In United States gold coin.

(Vignette.)

First-mortgage Bond.

No. —. Series "A."

The Southern Pacific Railroad Company (of California),

For value received, promises to pay one thousand dollars to Mark Hopkins, or bearer, in the city of New York, thirty years from the date hereof, with interest thereon at the rate of six per centum per annum from said date, payable semi-annually on the first day of

192 October next ensuing, and on the first day of April and October in each year thereafter, in the city of New York, on presentation and surrender of the respective coupons hereunto annexed, both principal and interest payable in United States gold coin at par, dollar for dollar.

This bond is one of series "A" of the first-mortgage bonds issued and to be issued by the said Southern Pacific Railroad Company in seven series, designated respectively by the letters of the alphabet,

commencing with "A" and ending with "G," both inclusive. Series "A," consisting of thirteen thousand bonds for one thousand dollars each, numbered from one to thirteen thousand, both inclusive, and four thousand bonds for five hundred dollars each, numbered from thirteen thousand and one to seventeen thousand, both inclusive. Series "B" to "F," both inclusive, consisting each of five thousand bonds for one thousand dollars each, numbered from seventeen thousand and one to forty-two thousand, both inclusive, and series "G," consisting of six thousand bonds for one thousand dollars each, numbered from forty-two thousand and one to forty-eight thousand both inclusive. All of said bonds being payable thirty years after their respective date, with the interest at the rate of six per centum per annum, payable semi-annually.

The said series "A" to bear date April first, eighteen hundred and seventy-five, and the said several succeeding series to bear such dates respectively as the board of directors of said company may direct; all of said bonds aggregating the sum of forty-six millions of dollars.

193 The holder of any of such bonds is to have no preference over any other holder of any of said bonds by reason of any priority in date or the time of issuing the same or otherwise.

All of said bonds are secured by a mortgage or deed of trust bearing even date with the bonds constituting series "A" duly executed, by said company to D. O. Mills and Lloyd Tevis, San Francisco, California, as trustees, upon its railroad and telegraph lines in the State of California, running from the city of San Francisco in a southerly and southeasterly direction by way of Carnadero junction, Salinas valley and Polonio pass to the Colorado river, at or near the "Needles;" also from Carnadero junction to San Benito; also from Los Gatos creek via Goshen to the junction with the first-mentioned line between Poso creek and Kern river; also from the junction near Tehachapi pass, via Los Angeles, to the Texas Pacific railroad near Fort Yuma, and also from Los Angeles to Wilmington on San Pedro bay, aggregating eleven hundred and fifty miles of railroad and telegraph line, with all the rolling stock, stations, fixtures and franchises for the permanent use thereof, and the appurtenances thereto now owned or held, or that may be hereafter required by said company for the permanent use of said railroad and telegraph lines.

Also upon all of the lands granted to said company by the Congress of the United States to aid it in the construction of said
194 railroad and telegraph lines, not sold or otherwise disposed of prior to the execution of said mortgage, aggregating, as near as can be estimated, eleven millions of acres.

In testimony whereof, the Southern Pacific Railroad Company has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president and secretary, this first day of April, in the year of our Lord one thousand eight hundred and seventy-five.

——— ———, *President.*
——— ———, *Secretary.*

And whereas, the said board of directors, at the meeting aforesaid, and in the manner and form and by the vote aforesaid did further direct that to each of said bonds there should be attached sixty interest coupons, numbered respectively from one to sixty, inclusive, substantially in the following form, to wit:

$30. Series "A."

Southern Pacific Railroad Company of California.

Coupon. Bond No. —. No. —.

Thirty dollars.

Interest due —.

Payable in the city of New York in United States gold coin.

—— ——, *Secretary.*

195 With such changes in amount in the body and in the coupons as shall be necessary to conform to the order of the board of directors aforesaid, in regard to the several amounts or sums which are payable in each class of bonds;

And whereas, by an act of Congress of the United States of America, approved on the twenty-seventh day of July, A. D. eighteen hundred and sixty-six, entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," there was granted to the said Southern Pacific Railroad Company, party of the first part, a large body of public lands of the United States, to wit: every alternate section of public lands, designated by odd numbers, to the amount of ten alternate sections per mile on each side of the railroad and telegraph line of said company running from the bay of San Francisco to the southeasterly line of the State of California, being about six hundred and thirty-six miles, not sold, reserved, granted, or otherwise appropriated, and free from pre-emption, homestead, or other claims or rights at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office, and such other alternate sections designated by odd numbers as aforesaid, and situated not more than ten miles beyond the limits of the said first alternate sections, which may be selected by said company in lieu of any of the sections first aforesaid which may have been sold, granted, reserved, pre-
196 empted, occupied as homesteads, or otherwise disposed of, or to which other rights may have attached, as provided in the act of Congress aforesaid for the purpose of aiding in the construction of the railroad and telegraph line of the said party of the first part;

And whereas, by an act of Congress of the United States of America, approved on the third day of March, eighteen hundred and seventy-one, entitled, "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," there was granted to the said Southern Pacific

Railroad Company the authority to construct a line of railroad from a point near Tehachapi pass, by way of Los Angeles, to the Texas Pacific railroad, at or near the Colorado river, with the same rights, land grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to and imposed upon the said Southern Pacific Railroad Company of California, by the aforesaid act of July twenty-seventh, eighteen hundred and sixty-six, before recited, subject to the rights, present and prospective, of the Atlantic and Pacific Railroad Company, which said last line of road is of the length of three hundred and fifty-six and seven one-hundredths miles;

And whereas, the said board of directors, at the meeting aforesaid, and in the manner and form, and by the vote aforesaid, did further direct that, to secure the payment of said bonds, a
197 first mortgage upon said road and its rolling stock, stations, fixtures, right of way and franchises, and the lands aforesaid granted by said acts of Congress, not sold or otherwise disposed of, or contracted to be sold, as shown by the books of said company, should be executed under the corporate seal of said company, and be signed by its president and secretary, to D. O. Mills and Lloyd Tevis, both of the city and county of San Francisco, State of California, as trustees for the holders of said bonds;

And whereas, said board of directors, at the meeting aforesaid, and in the manner and form, and by the vote aforesaid, did further direct that a sinking fund should be created for the redemption and payment of said bonds, by setting apart the sum of one hundred thousand dollars of the net income of said road in the year eighteen hundred and eighty-two, and each year thereafter until all of said bonds, principal and interest, shall have been redeemed or paid, in trust, to be loaned out at interest, upon good security, or otherwise invested under the order and direction of said board of directors, or used to redeem said bonds as often as one hundred thousand dollars shall come into the sinking fund, in which case notice shall be published in one paper in the city of San Francisco and two papers in New York city, that bonds will be redeemed at a price not exceeding their par value, and inviting bids for the surrender thereof at prices to be named, not exceeding the par value of said bonds; the lowest bids less than par to be accepted, and bonds redeemed to the extent of the money in the sinking fund.

198 Now therefore this indenture witnesseth, that the said Southern Pacific Railroad Company for the better securing of the payment of the principal and interest of the said first-mortgage bonds, and in consideration also of the sum of one dollar, to it in hand paid by said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and aliened, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, convey and confirm unto the said parties of the second part, and to their successors duly appointed for the execution of the trusts herein set forth, the following property now or hereafter constituted, purchased, acquired, held in possession and owned by said company, to wit: The whole of the railroad and telegraph line of

the said company, running from the city of San Francisco, in the State of California, in a southerly and southeasterly direction, by way of Carnadero junction, Salinas valley and Polonio pass, to the Colorado river at or near the "Needles;" also from Carnadero junction to San Benito; also from Los Gatos creek, via Goshen, to the junction with the first-mentioned line between Poso creek and Kern river; also, from the junction near Tehachapi pass, via Los Angeles, to the Texas Pacific railroad near Fort Yuma, and also from Los Angeles to Wilmington, on San Pedro bay, aggregating eleven hundred and fifty miles of railroad and telegraph lines, including all the rights of way, roadway, track and tracks, together with all the superstructures, depots, de-
199 pot grounds, station-houses, watering places, workshops, machine shops, machinery, side tracks, turnouts, turn-tables, weighing scales, locomotives, tenders, cars, rolling stock of all kinds, full equipments, fixtures, tools and all other property which may be necessarily or ordinarily used in operating or repairing the said railroad, including all of the said property which is now or may hereafter, in whole or in part, be constructed or completed, purchased, acquired, held, or owned by said company, pertaining to said railroad, and all the corporate rights, privileges and franchises of said company pertaining to said road, together with all and singular the tenements, hereditament- and appurtenances thereunto belonging and appertaining, and the reversion and reversions, remainder and remainders, rents, incomes, issues and profits thereof, with all the rights, titles, interests, estate, property, succession, claim and demand, in law or equity, of the said party of the first part, of, in and to the same, or any part and parcel thereof; to have and to hold the above granted and described premises, property and franchises, with the appurtenances, unto the said parties of the second part, and to the survivor of them, and to their successors, duly appointed, upon trust and for the use and benefit of the person or persons, body or bodies, politic or corporate, who shall have become, or be from time to time, holders of the said "first-mortgage bonds," or any of them. Provided, always, and these presents are upon
200 the express condition that if the said party of the first part, or its successors, shall well and truly pay, or cause or procure to be paid unto the holders, from time to time, of said bonds, and each and every one of them, the said sums of money secured to be paid by the said bonds, and the interest coupons attached thereto, at the places and times, and in the manner set forth in said bonds, according to the true intent and meaning thereof, then these presents and all the property, estate, right, franchises and privileges herein and hereby granted and conveyed, shall cease, determine and be void. But if default shall be made in the payment of the said sums of money specified in said bonds, or in the payment of said interest coupons, or either of them, or any part thereof, and if the same shall remain unpaid for the period of six months from and after the time when the same should have been paid, according to the terms of said bonds, then the said parties of the second part, or either of them, upon the refusal of the other, or their successors in

said trust, by themselves or their agents or servants, in that behalf, may, upon request of the holder or holders of not less than one-fourth of said bonds, on which the interest or principal shall so be, and have so remained in default, as aforesaid, enter into and upon and take possession of all, or in their or his discretion, any part of the said premises and property hereinbefore described, and work and operate the said railroad, and receive the income, receipts and profits thereof, and out of the same pay:

201 First. The expense of running and operating the same, including therein such reasonable compensation as they or he may allow to the several persons employed or engaged in the running and superintendence of the same, and a reasonable compensation to the parties of the second part, or their successors, or such of them as shall act in the premises, for their or his care, diligence and responsibility in the premises.

Second. The expenses of keeping the said road, the appurtenances, the locomotives and the rolling stock thereof in good and sufficient repair, to prevent deterioration in the value thereof, and all other reasonable and proper charges and expenses of the care and management thereof; and

Third. Pay, as far as the same will suffice, all interest and principal, if any, which may be due on said bonds; and, in case of any deficiency, to apply said receipts, after the payment of all said charges and expenses, to the payment thereof, ratably, without preference of any kind, or the said parties of the second part may in such case foreclose this mortgage, and sell and dispose of, according to law, all the rights, property, privileges, franchises, real and personal, with the appurtenances herein and hereby granted, or so much thereof as may be necessary, and out of the money arising from such sale, pay: First. The costs, and charges, and expenses of the foreclosure and sale, including therein reasonable counsel

202 fees for conducting said proceedings, to be allowed and fixed by the court, but not exceeding thirty thousand dollars. Second. Any expenses, costs and charges of the execution of the trust previously incurred and remaining unpaid. Third. A reasonable compensation to the trustees, or one of them, who may act for their or his care, trouble and service in completing the execution of his trust and the distribution of the proceeds of sale, to be fixed by the court, but not exceeding twenty thousand dollars. And fourth. To distribute the residue of said proceeds among the holders of said bonds, in proportion to their several interests, until all have been paid in full, principal and accrued interest.

And the said party of the first part hereby covenants and agrees that if at any time any lands now used for depot or shop purposes, or right of way, or water, or any lands not now used, but which may be hereafter used for such purposes, shall for any cause cease to be needed or used by said party of the first part for such purposes, the said parties of the second part may sell the same at the price to be agreed upon by the parties of the first and second parts and apply the money realized from such sale or sales to the redemption of said bonds in the manner hereinafter provided in the case

of money realized from the sale of lands granted by the United States to the said party of the first part.

And the said party of the first part hereby agrees and covenants to and with the said parties of the second part, and their
203 successors in said trust, that it will pay all ordinary and extraordinary taxes, assessments and other public burdens and charges which shall or may be imposed upon the property herein described and hereby mortgaged, and every part thereof, and the said parties of the second part, the survivor of them, or their successors in said trust, or any one or more of the holders of said bonds, may in case of default of the said party of the first part in this behalf pay and discharge the same, and any other lien or incumbrance upon said property which may in any way, either in law or equity, be or become in effect a charge or lien thereon prior to these presents, or to which this mortgage may be subject or subordinate, and for all payments thus made, the parties so making the same shall be allowed interest thereon at the rate of seven per centum per annum, and such payments, with the interest thereon, shall be and are hereby secured to them by these presents, and declared to be payable and collectable in the same sort of currency or money wherein they shall have been paid, and the same shall be payable by said party of the first part to said parties of the second part, upon demand, in trust for the party or parties paying the same, and may be paid out of the proceeds of the sale of said property and franchises hereinbefore provided.

And the said party of the first part hereby further covenants and agrees to and with the said parties of the second part, and their successors in said trust, that they will at any and all times hereafter, upon the request of the said parties of the second part, exe-
204 cute, acknowledge and deliver to the said parties of the second part, all and every such further, necessary and reasonable conveyances and assurances of the said premises, or any part thereof, as may by the parties of the second part, or the survivor of them, or his or their successors in the trust hereby created, be reasonably advised or required for more fully carrying into effect the objects of this conveyance, and the said parties of the second part, and their successors in said trust, shall be entitled to receive a just and proper compensation for all services rendered by them in the discharge of said trust, and the same shall be deemed to be secured hereby.

And it is hereby stipulated and agreed that the said parties of the second part, and their successors in said trust, shall not be responsible for the acts or omissions of any agent or agents employed by him or them, in any manner, in and about the execution of the trust hereby created, when such agent or agents are selected with reasonable discretion; or with the approbation, or with the knowledge and without the express disapprobation of said party of the first part, nor shall either of the said parties of the second part be responsible for any act or omission of the other in the execution of said trust.

And, therefore, this indenture further witnesseth: That the said party of the first part, for the purpose of securing the payment of

the sums of money mentioned in said bonds, and the interest thereon, and in consideration of the premises, and also for
205 and in consideration of the sum of one dollar to the said party of the first part in hand paid by the parties of the second part, the rece-pt whereof is hereby acknowledged, has granted, bargained, sold, released, enfeoffed, conveyed and confirmed, and by these presents does grant, bargain, sell, release, enfeoff, convey and confirm unto the said parties of the second part, as trustees, and to their successor and survivor, and their assigns forever.

All and singular the said several sections of land so as aforesaid granted by said acts of Congress; and also all the estate, right, title, interest, claim and demand whatsoever, at law or in equity, of, in, or to the same, or any part or parcel thereof, which the said party of the first part now has, holds, owns, or is entitled to, or hereafter may or shall acquire, have, hold, own, or be or become entitled to by force or virtue of the said acts of Congress; saving, excepting and reserving all parts and parcels of said lands which have been sold or contracted to be sold or disposed of heretofore, or which are or shall be included in the right of way of the said railroads and telegraph lines of the said company, as defined and granted by the acts of Congress aforesaid, or used for the construction or operation thereof, or for the track, yards, depot grounds, buildings or erections thereof.

To have and to hold all and singular the lands hereby granted, or intended to be granted, and each and every part and parcel thereof, with the appurtenances thereunto belonging, unto
206 the said parties of the second part, and their successors and survivor, and their assigns forever as trustees, for the uses and purposes and upon the trusts, terms, conditions and agreements in this indenture set forth and declared;

Provided, always, and these presents are upon the express condition, that if the said party of the first part shall well and truly pay, or cause to be paid to the holders of said bonds, and every of them, the principal sums of money therein mentioned, according to the tenor thereof, with the interest thereon, at the times and in the manner hereinbefore provided, according to the true intent and meaning of these presents, then and from thenceforth this indenture and the estate hereby granted, shall cease and determine, and all the right, title and interest in any and all property hereby conveyed to the parties of the second part, not then disposed of under the powers hereby conferred, shall revert to and vest in the said party of the first part.

This indenture further witnesseth, that these presents and the said bonds are made, executed and delivered upon the trusts, terms, conditions and agreements following, that is to say: That all the lands hereinabove conveyed and mortgaged shall be under the sole and exclusive management and control of the said party of the first part, who shall have full power and authority to make contracts for the sale of the same at such price, on such credit or terms of payment, and such other conditions as shall be agreed

on by the said parties of the first and second parts, and as
207 shall seem to them best calculated to secure the payment in full of all the bonds issued as hereinbefore provided, until entry or foreclosure by the trustees, as hereinafter provided. But no title to any tract of land contracted to be sold by the said party of the first part, shall be given until the whole of the purchase-money of said tract shall be paid to said parties of the second part, or their successors or survivor, in cash, or in said bonds or overdue coupons thereof. And for this purpose it is agreed that the said party of the first part and said trustees shall cause all such lands, as they shall from time to time become subject to sale, to be carefully examined and surveyed, and shall affix to each tract or parcel, such price as in their judgment shall be most judicious, having in view the interests of all parties; and said lands shall be and remain at all times thereafter open for sale to any person who may desire to purchase and pay therefor; the prices being, nevertheless, at all times subject to revision and alteration by the said parties; and the party of the first part may reserve from sale any lands necessary for depot grounds or other purposes connected with the construction or operation of the said railroad or telegraph.

The purchaser of any such land shall be at liberty to pay for the same in the aforesaid bonds or overdue coupons at par; and when any tract or parcel of said lands shall have been purchased and paid for, either in bonds, coupons or cash, as hereinbefore provided, the same shall be conveyed by the said parties of the first and second parts to the purchaser, in fee-simple, and shall by such con-
208 veyance be absolutely and forever released from any and all lien or incumbrance for or on account of said bonds, or any other debt or obligation of the said party of the first part.

Provided, that for the sake of convenience in making said conveyances, the said trustees shall have power to act by attorney, duly nominated and appointed by them, jointly, by letter of attorney, which shall be duly acknowledged and recorded in each and all of the counties in which said lands, or any part thereof, are situated; and all deeds made in their names by such attorney shall have the same force and effect as if made by them in person.

Provided, further, that the attorney so appointed shall be a resident of the city of San Francisco, in the State of California, and shall reside within convenient reach of the party of the first part.

The said trustees shall and will cancel and discharge each and every bond and the coupons thereon, and all overdue coupons which they may receive in payment for land, or by purchase, by defacing the seal of the corporation, perforating the signature of the president and secretary, and drawing lines across each of the interest coupons on receipt thereof; and all bonds and coupons received in payment for lands, as aforesaid, shall, when so canceled, be delivered to the said party of the first part.

The said trustees shall apply the proceeds of the sales made by them of lands hereby conveyed to the sole and exclusive pur-
209 pose of the payment of the bonds provided for in, and issued in conformity to, the terms of this indenture.

And for such purpose all such avails shall, from time to time, as the same are realized, be used in the purchase of such bonds in the market, to be canceled, so long as purchases thereof can be made at par; and whenever such bonds cannot be purchased at that rate said trustees shall advertise for proposals to sell such bonds to them in two newspapers published in the city of New York and one newspaper published in the city of San Francisco; and after receiving such proposals they shall have power to purchase such bonds at the lowest terms so offered.

The said party of the first part does hereby covenant and agree to pay to the holders of said bonds, respectively, the said principal sums of money therein mentioned, and the interest thereof as aforesaid.

If any default shall be made in the payment either of principal or interest on any of said bonds for six months after demand at the place of payment, when the same shall become due, then the said trustees may, on being requested by the holders of at least one hundred thousand dollars of such bonds, enter into and take possession of any of the lands above conveyed, and foreclose this mortgage, and may sell at public auction so much of said lands as may be necessary to discharge all arrears of such interest, and apply
the proceeds, after deducting the costs, charges and expenses
210 of such entry, foreclosure and sale to the payment of such
arrears of interest. If any such default shall continue for one year from the time of such demand and refusal, the principal sum of all bonds then outstanding shall become due and payable, and the said trustees may enter into and take possession of all the lands above, by these presents mortgaged or conveyed, foreclose this mortgage and sell at public auction all said lands, or so much thereof as may be necessary, first giving at least six months' previous notice of the time and place of sale in at least one newspaper published in the city of New York, and in one published in each of the cities of San Francisco, Sacramento, Los Angeles and San Diego; and they shall apply the proceeds thereof, after deducting the costs, charges and expenses of such last-mentioned entry, foreclosure and sale, to the payment of all said bonds then outstanding, and the interest accrued thereon, rendering the surplus, if any there shall be, unto the said party of the first part. In case of any sale upon any such foreclosure or at any such public auction, the said trustees shall make, execute and deliver a conveyance of the said lands so sold, which shall convey to the purchasers all the rights and privileges of the said party of the first part, in and to the property so sold to the same extent as the same shall have been previously enjoyed and held by the said party of the first part.

If, after any such entry shall be made or any such fore-
211 closure proceedings shall be commenced, for the satisfying
of interest only, as above provided, and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest and deliver the coupons therefor to the said trustees, and pay all the costs, charges and expenses incurred in

such entry and foreclosure and the proceedings thereon, then and in every such case the said trustees shall discontinue their proceedings thereon, and restore to the said party of the first part all of such lands to be held subject to the above conveyance and mortgage, and subject to all the provisions, terms and conditions of these presents, in like manner as if such entry had not been made, nor such foreclosure proceedings commenced. In case a vacancy shall happen in the number of trustees hereinbefore mentioned as parties of the second part in this indenture, or if one of them shall be temporarily absent, the remaining trustee shall, while said vacancy or absence exists, have all the rights, exercise all the powers, and discharge all the duties devolving on the said trustee by said instrument. But as soon as it conveniently may be done, such vacancy shall be filled by the nomination by the remaining trustee of some proper person to fill the vacancy, which nomination shall be submitted to the board of directors of said company, and, if approved by them, the person so nominated and approved immediately shall become a trustee under this instrument. If said nomination is not approved, another person shall be nominated by said remaining trustee, and in like manner submitted for approval, and so
212 on till three nominations shall have been made. But if three successive nominations shall be made and none of them shall be approved by said board, said vacancy shall be filled by a committee of three persons, selected, one by said remaining trustee, one by said board of directors, and a third by the two thus selected, and the person appointed trustee by a majority of the committee shall be and remain a trustee under this instrument. And the person regularly appointed trustee to fill a vacancy in either of the forms above specified, shall, from and after his said appointment and his acceptance of the appointment, become vested with the same estate, powers, rights and interests, and charged with the same duties and responsibilities as if he had been one of the original trustees, parties of the second part, named in and executing this instrument; and the prior remaining trustee may and shall execute such conveyances and instruments as may be proper or necessary to vest the same in such new trustee jointly with him, or to furnish evidence of such vesting. If at any time either of the said trustees shall resign his place as trustee by a proper deed in writing to that effect, and such resignation shall be accepted by the said party of the first part, then, and in every such case, the place of such resigning trustee thereupon shall become and be vacant.

Whenever all the bonds which shall have been made and issued by the said party of the first part under and in conformity to
213 the provisions of this indenture, with the interest thereon, together with all the expenses incurred by the said trustees in the execution of the trust herein and hereby created, shall have been fully paid or satisfied, the said trustees shall reconvey to the said party of the first part all and singular the said lands then in the hands of the said trustees, and not before that time sold or disposed of, in the execution of the trust hereby created. In case the said trustees shall at any time have any trust moneys on hand, received from the sale

of the lands hereby conveyed which will not be required to meet any immediate liabilities of the company, to which said moneys are by these presents devoted, the said moneys shall be loaned on interest or deposited on interest, with some bank or trust company in the city of San Francisco or Sacramento, subject to be drawn by checks signed by the trustees or such one of them as they may designate. All of the books of the said company, and of the trustees, relating to the lands hereby conveyed, shall be mutually open to the inspection of said company and said trustees. It shall be the duty of the said trustees to certify and deliver to the said party of the first part the said bonds, as the same from time to time shall be demanded, issued or used by the said party of the first part.

And it is hereby mutually agreed by and between the parties hereto, that the said party of the second part, and their survivor and successors, and their heirs, executors and administrators,
214 shall not be answerable for the acts, omissions or defaults of each other, nor for anything short of their own gross negligence or wilful misfeasance.

It is hereby declared by the parties to this indenture, that all the provisions of said acts of Congress, so far as they are applicable, are hereby made, and shall be deemed and taken to be part of this instrument; and the said provisions in all that concerns the sale and disposal of the said lands hereby conveyed to the parties of the second part are to be observed and strictly and faithfully carried out and fulfilled.

And the said party of the first part covenants and agrees to, and with the said parties of the second part, that the said party of the first part shall and will, at any and all times hereafter, and from time to time, execute, acknowledge and deliver, under its corporate seal, to the said parties of the second port, and their survivors or successors, all such other or further assurances, deeds, mortgages, obligations, transfers, indentures and instruments in writing, and shall and will do and perform all such other or further acts or things, as shall or may be necessary or proper, or as their counsel, learned in the law, shall deem necessary, proper or expedient for the better or more effectually securing upon the above conveyed and mortgaged premises, the payment of the said bonds so to be issued, and the interest due and to grow due thereon in manner aforesaid, or for carrying into effect the true intent, design, objects and purposes of these presents. And the said parties of the
215 second part hereby accept the trust created and declared by this instrument, and agree to discharge the same pursuant to the provisions in that behalf herein contained.

In witness whereof, the said Southern Pacific Railroad Company has caused these presents to be signed by its president and secretary, and sealed with its corporate seal, and the above parties of the second part have hereunto set their hands and seal, the day and year first above written.

[SEAL.]

CHARLES CROCKER,
President Southern Pacific Railroad Company.
J. L. WILLCUTT,
Secretary Southern Pacific Railroad Company.

We accept the trust declared in the foregoing instrument.

[SEAL.] D. O. MILLS,
[SEAL.] LLOYD TEVIS, *Trustees.*

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On this third (3rd) day of July, in the year one thousand eight hundred and seventy-five (1875), before me, Charles J. Torbert, a notary public in and for the said city and county of San Francisco, State of California, duly commissioned and qualified, personally appeared Charles Crocker, known to me to be the president
216 of the Southern Pacific Railroad Company, and J. L. Willcutt, known to me to be the secretary of the Southern Pacific Railroad Company, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal this 3rd day of July, A. D. 1875.

[SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

I, Charles J. Torbert, a notary public in and for the said city and county of San Francisco, State of California, residing in the city of San Francisco, duly commissioned and sworn, do certify that on the sixth (6th) day of July in the year one thousand eight hundred and seventy-five (1875), personally appeared before me in the city and county of San Francisco, State of California aforesaid, Charles Crocker, president of the "Southern Pacific Railroad Company," and J. L. Willcutt, secretary of the "Southern Pacific Railroad Company," who are both personally known to me to be the said officers of the said "Southern Pacific Railroad Company," respectively, and the individuals described in and who have executed
217 the foregoing instrument as such officers of said company, and they each severally and personally, then and there acknowledge to me that they executed the said instrument as the free act and deed of the said "Southern Pacific Railroad Company," freely and voluntarily, and for the uses and purposes therein mentioned; and the said J. L. Willcutt, with whom I am personally acquainted, being by me duly sworn, did depose and say that he resides in the city and county of San Francisco, State of California; that he is and was secretary of the "Southern Pacific Railroad Company" at the date and time he executed the foregoing instrument; that he knows the corporate seal of said company, and is, and was at the date of said instrument, the legal custodian of said seal; that the seal affixed to the foregoing instrument was and is such corporate seal, and was by him so affixed by order of the board of directors of the said "Southern Pacific Railroad Company;" that he

signed his name thereto as secretary of said company by the like order. And the said J. L. Willcutt further said that he was and is acquainted with Charles Crocker, and knows that said Charles Crocker is and was president of the "Southern Pacific Railroad Company," at the date of said instrument; that the signature of the said Charles Crocker subscribed to said instrument is in the genuine handwriting of the said Charles Crocker, and was thereto by him subscribed by the like order of the board of directors of the said company, and in the presence of him, the said deponent.

218 In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, State of California, the 6th day of July, A. D. 1875.

[SEAL.] CHARLES J. TORBETT,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On this seventh (7th) day of July, in the year one thousand eight hundred and seventy-five (1875), before me, Charles J. Torbert, a notary public in and for the said city and county of San Francisco, State of California, duly commissioned and qualified, personally appeared D. O. Mills and Lloyd Tevis, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, State of California, this 7th day of July, A. D. 1875.

[SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

Filed for record at the request of D. W. Parkhurst, and recorded in office of the county recorder of San Mateo county, July
219 8th, 1875, at 5 p. m., in Liber 11 of Mortgages, at page 2 and following.

Witness my hand and seal of office.

[SEAL.] GEO. H. RICE,
County Recorder,
By W. R. THOMAS, *Deputy.*

Paid $22.50.

Filed for record at the request of D. W. Parkhurst, July 9th, A. D. 1875, at 9 o'clock, and 26 minutes a. m., and recorded in Book 15 of Mortgages, at page 156, *et seq.*, records of the county of Santa Clara, in the State of California.

Witness my hand and seal of office.

[SEAL.] W. J. COLAHAN,
County Recorder,
By F. J. SAXE, *Deputy.*

Paid $15.

Filed for record at the request of D. W. Parkhurst, July 9th, A. D. 1875, at 8 o'clock, and 53 minutes p. m., and recorded in Book 1 of Mortgages, at page 586 and following, records of San Benito county, in the State of California.

Witness my hand and seal of office.

[SEAL.] H. M. HAYES,
County Recorder.

Fees $15, paid.

Filed for record at the request of D. W. Parkhurst, July 10th, A. D. 1875, at 8 o'clock, and 10 minutes p. m., and recorded
220 in volume 17, page 529, and following pages of the mortgage records of the county of Santa Cruz, in the State of California.

Witness my hand and seal of said county recorder.

[SEAL.] H. E. MAKENNEY,
County Recorder in and for Santa Cruz County.

Paid $15.00.

Filed for record at the request of D. W. Parkhurst, July 12th, A. D. 1875, at 9 o'clock, and 55 minutes a. m., and recorded in Book 1 of Mortgages, page 183, and following, records of the county of Monterey, in the State of California.

Witness my hand and seal of office.

[SEAL.] HERBERT MILLS,
County Recorder.

Fees $15, p'd.

Filed for record at the request of D. W. Parkhurst, July 13th, A. D. 1875, at six o'clock, and 25 minutes p. m., and recorded in Book "C" of Mortgages, page 540, *et seq.*, records of the county of San Luis Obispo, in the State of California.

Witness my hand and seal of office county recorder.

[SEAL.] CHAS. W. DANA,
County Recorder.

Fees $15.00.

221 Filed for record at the request of D. W. Parkhurst, July 14th, A. D. ——, at 2 o'clock, and 20 minutes p. m., and recorded in Book "F" of Mortgages, pages 164 and following, records of the county of Santa Barbara, in the State of California.

Witness my hand and seal of county recorder.

[SEAL.] H. P. STONE, *County Recorder,*
By J. O. B. WENTLING, *Deputy.*

Fees $15, p'd.

Filed for record at the request of D. W. Parkhurst, July 16th, A. D. 1875, at 8 o'clock, and 40 minutes a. m., and recorded in Book 15 of Mortgages, page- 600, *et seq.*, records of the county of Los Angeles, in the State of California.

Witness my hand and seal of office county recorder.

[SEAL.] J. W. GILLETTE,
County Recorder,
By D. S. LOVEJOY, *Deputy.*

Fees $15, p'd.

Filed for record at the request of D. W. Parkhurst, July 19th, A. D. 1875, at nine o'clock, and 15 minutes a. m., and recorded in Book, volume 2, of Mortgages, pages 217 and following, records of county of Kern, in the State of California.

Witness my hand and seal of office.

[SEAL.] F. W. CRAIG,
County Recorder.

Fees $15, p'd.

222 Filed for record at the request of D. W. Parkhurst, Esq., July 20th, A. D. 1875, at 8 o'clock, and 15 minutes p. m., and recorded in Book D of Mortgages, pp. 310 *et seq.*, records of the county of Fresno, in the State of California.

Witness my hand and seal of office of county recorder.

[SEAL.] A. M. CLARK, *County Clerk,*
By C. L. WAINWRIGHT, *Deputy.*

P'd $15,00.

Filed for record at request of D. W. Parkhurst, July 21st, A. D. 1875, at 10 o'clock, and 30 minutes a. m., and recorded in Book "K" of Mortgages, page- 1, *et seq.*, records of the county of Tulare, in the State of California.

Witness my hand and seal of office of county recorder.

[SEAL.] J. E. DENNY, *Recorder,*
By JOHN G. KNOX, *Deputy.*

P'd $15.00.

Filed for record at request of D. W. Parkhurst, July 23d, A. D. 1875, at 10 o'clock, and 40 minutes p. m., and recorded in Book "D" of Mortgages, 544 *et seq.*, records of the county of San Bernardino, in the State of California.

Witness my hand and seal of office of county recorder.

[SEAL.] SYDNEY P. WAITE,
County Recorder,
By R. S. SWING, *Deputy.*

P'd $15.00.

223 Filed for record at the request of D. W. Parkhurst, July 26th, A. D. 1875, at 10 o'clock, and 20 minutes a. m., and recorded in Book No. 7 of Mortgages, pages 103, *et seq.*, records of the county of San Diego, in the State of California.

Witness my hand and seal of office of county recorder.

[SEAL.] A. S. GRANT,
County Recorder,
By E. G. HAIGHT, *Deputy.*

Fees $15.00.

Filed for record at the request of D. W. Parkhurst, July 28th, A. D. 1875, at 24 minutes past 4 p. m., and recorded in Book No. 2 of Mortgages, pages 46, *et seq.*, records of the county of Ventura, State of California.

Witness my hand and seal of office of county recorder.
[SEAL.] JOHN T. STOW,
County Recorder.

Fees $18.00.

Recorded at the request of D. W. Parkhurst, August 3d, A. D. 1875, at 1 p. m., in Liber 443 of Mortgages, page 309, in the office of the county recorder of the city and county of San Francisco, State of California.
[SEAL.] O. H. FRANK,
County Recorder.

Recorded at request of Wells, Fargo & Co., August 20, 1880, at 20 min. past 9 a. m., in Book 1 of Mortgages, page- 557, *et seq.*, records of Merced county.
[SEAL.] E. J. HAMILTON,
County Recorder,
By M. H. WALSH, *Deputy.*

224 Recorded at request of Wells, Fargo & Co., August 23d, A. D. 1880, at 5 min. past 9 o'clock a. m., in Vol. 15 of Mortgages, at pages 139, *et seq.*, records of Stanislaus county.
[SEAL.] JOHN McCOY, *Recorder.*

$15.00 paid.

Recorded at request of J. L. Willcutt, September 6th, 1880, at 30 min. past 10 o'clock a. m., in Liber 624 of Mortgages, page 305, in the office of the county recorder of the city and county of San Francisco, State of California.
[SEAL.] W. K. DIETRICH,
County Recorder,
Per RICHARD BLAUVELT, *Deputy.*

First Amendments to Answer.

On the 19th day of November, 1892, defendant duly served and filed, by consent of plaintiff and leave of court first duly had and obtained, its amendments to its answer herein as follows:

(Title of Court and Cause.)

Comes now the above-named defendant, Southern Pacific Railroad Company, and, by leave of the court first had and obtained, amends its answer on file herein as follows:

I.

Defendant hereby adds to its affirmative defenses herein the following:

225 *County Tax Not the Same in All Townships and Districts.*

The defendant, upon its information and belief, avers that the tax levied by the board of supervisors for said fiscal year was not

fixed at the same rate in every city, town, township and district in said county or counties; and defendant, upon its information and belief, avers that the said tax was levied by said State board without authority of law, and that the same was illegally placed upon said assessment rolls or books and delinquent lists, because, as defendant avers, the State board of equalization has not apportioned said alleged assessment of the franchise, etc., to said cities, towns, townships and districts, as required by section 10 of article XIII of the constitution of California; and defendant avers that upon the assessment-rolls and delinquent lists of said counties the said several taxes, State, county, city and county, city, town, township and district, are blended and cannot be separated; and the defendant avers that its said railroad, in passing through each and every one of the counties, and cities and counties, hereinbefore referred to, passes through cities, towns, townships and districts thereof.

II.

In the third line of the 17th paragraph of defendant's affirmative defenses, defendant hereby changes the word "assessor" to the word "auditor."

226 III.

Defendant hereby adds the following affirmative defense to its answer herein:

Pretended Assessment and Apportionment Made Before any Other Assessments in the State.

At the time the said pretended assessment and said pretended apportionment was made by the State board of equalization, no assessment book or roll for the said fiscal year had been completed or was in existence, nor had a single assessment or valuation, for the purposes of taxation for said fiscal year, been ascertained or fixed, as provided by law or otherwise, and that said board, in making said valuation and apportionment, neither did nor could exercise any of the powers relative to the equalization of values for the purposes of taxation.

IV.

Defendant hereby adds the following affirmative defense to its answer herein:

No Rules or Regulations.

Said State board of equalization has never at any time made or adopted any rule or regulation relative to the assessment or valuation of railway property of any kind, nor has it ever made or adopted any rule to govern or regulate its proceedings in the exercise of the powers conferred upon it by section 10 of article XIII of the constitution of California.

227 V.

Defendant hereby adds the following affirmative defense to its answer herein:

Valuation Excessive.

Neither the franchise, roadway, road-bed, rails or rolling stock were assessed by the said State board of equalization in said pretended assessment at their actual value, or in proportion to their value, but were willfully and intentionally assessed greatly in excess and out of proportion to such value, and greatly in excess and out of proportion to the rate at which all other property in said State is valued for the purposes of taxation, to wit, one hundred per cent. in excess thereof.

H. S. BROWN AND
FOSHAY WALKER,
Attorneys for Defendant, Southern Pacific Railroad Company.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

J. L. Willcutt, being duly sworn, deposes and says: That he is the secretary of The Southern Pacific Railroad Company, defendant in the above-entitled action; that he has read the foregoing amendment of answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

J. L. WILLCUTT.

228 Subscribed and sworn to before me, this 10th day of November, 1892.

[SEAL.] E. B. RYAN,
Notary Public.

Second Amendments to Answer.

On the 11th day of January, 1893, during the trial of this action, defendant duly served and filed, by consent of plaintiff and leave of court first duly had and obtained, its amendments to its answer herein as follows (plaintiff in open court at the time expressly waiving verification thereof):

(Title of Court and Cause.)

Comes now the above-named defendant, and, by leave of court first had and obtained, files the following amendments to its answer herein:

I.

Paragraph II of the affirmative defenses of said answer is hereby amended by striking out from said paragraph the following words: "In the year 1868 it was duly organized under an act of the legislature of the State of California, approved May 20th, 1861, entitled,

'An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto,'" and the term of its existence was fixed at fifty years from the date of its organization; and it is still a corporation duly
229 organized under said law, except in so far as its organization, existence and character may be affected or modified by the Federal statutes hereinafter referred to, and by inserting in lieu thereof the following words: "On the 2d day of December, 1865, the Southern Pacific Railroad Company was duly incorporated and organized under the general laws of the State of California." Thereafter, to wit, on the 12th day of October, 1870, the San Francisco and San Jose Railroad Company, the Santa Clara and Pajaro Valley Railroad Company and the California Southern Railroad Company, all railroad corporations duly incorporated, organized and existing under the general laws of the State of California, pursuant to the laws of said State providing for the amalgamation and consolidation of railroad corporations, were, together with said Southern Pacific Railroad Company, duly amalgamated and consolidated under the corporate name of the Southern Pacific Railroad Company. That on the 19th day of August, 1873, the said Southern Pacific Railroad Company and the Southern Pacific Branch Railroad Company, a corporation duly incorporated, organized and existing under the laws of the State of California, were by virtue of the laws of said State providing for the amalgamation and consolidation of railroad corporations, duly consolidated under the corporate name of the Southern Pacific Railroad Company. That on the 18th day of December, 1874, the said consolidated Southern Pacific Railroad Company was, by virtue of the laws of the State of California
230 providing for the amalgamation and consolidation of railroad corporations, duly consolidated with the Los Angeles and San Pedro Railroad Company, a railroad corporation theretofore duly incorporated, organized and existing under the laws of the State of California. That said last-named consolidated corporation is the defendant in this action.

II.

Paragraph III of the affirmative defenses of said answer is hereby amended by striking out the words "as such corporation, it" at the commencement of said paragraph, and inserting in lieu thereof the words, "said defendant and its constituent corporations."

III.

Paragraph VII of the affirmative defenses of said answer is hereby amended by inserting in said paragraph before the word "defendant," wherever the same appears therein, the words "Southern Pacific Railroad Company, the first-named of the constituent corporations of."

IV.

Paragraph VIII of the affirmative defenses of said answer is hereby amended by striking out therefrom, in line 27 of page 64 of

defendant's answer, the word "defendant," and inserting in lieu thereof the words "said Southern Pacific Railroad Company."

231 V.

Paragraph XI of the affirmative defenses of said answer is hereby amended by inserting before the word "defendant" therein, the words, "the consolidated Southern Pacific Railroad Company, secondly hereinbefore mentioned as one of the constituent corporations of."

H. S. BROWN AND
FOSHAY WALKER,
Attorneys for Defendant.

J. E. FOULDS, *Of Counsel.*

Findings of Fact and Conclusions of Law.

On the 3d day of February, 1893, the court made, signed and filed its written findings of fact and conclusions of law herein as follows:

(Title of Court and Cause.)

This action came on regularly on January 9th, 1893, to be tried by the court, without a jury, a trial by jury having been duly waived, W. H. H. Hart, attorney general, Langhorne and Miller and A. R. Cotton, appearing as counsel for plaintiff, Messrs. J. E. Foulds and Foshay Walker appearing as counsel for defendant, whereupon proofs, both oral and documentary, were introduced by the parties, and the action fully tried, argued and submitted to the court for decision, and the court having considered the same, now makes its decision and finds as follows:

232 I.

As to the first cause of action in the amended complaint, the court finds that all the allegations of said first cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action is, as to Langhorne & Miller, a sum equal to 7½ per cent. on $100,320, principal of tax hereby found delinquent and unpaid, to wit, the sum of $7,524.00, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent unpaid tax, to wit, the sum of $2,508.00.

II.

As to the second cause of action in the amended complaint, the court finds that all the allegations of said second cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action, is as to Langhorne & Miller, a sum

equal to 7½ per cent. on $2,959.41, principal of tax hereby found delinquent and unpaid, to wit, the sum of $221.96, and as to A. R. Cotton a sum equal to 2½ per cent. on said principal sum of delinquent unpaid tax, to wit, the sum of $73.98.

233 III.

As to the third cause of action in the amended complaint the court finds that all the allegations of said third cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action, is as to Langhorne & Miller a sum equal to 7½ per cent. on $34,479.07, principal of tax hereby found delinquent and unpaid, to wit, the sum of $2,585.93, and as to A. R. Cotton a sum equal to 2½ per cent. on said principal sum of delinquent unpaid tax, to wit, the sum of $861.97.

IV.

As to the fourth cause of action in the amended complaint, the court finds that all the allegations of said fourth cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action, is as to Langhorne & Miller a sum equal to 7½ per cent. on $20,149.03, principal of tax hereby found delinquent and unpaid, to wit, the sum of $1,511.18, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent unpaid tax, to wit: the sum of $503.72.

234 V.

As to the fifth cause of action in the amended complaint, the court finds that all the allegations of said fifth cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action, is as to Langhorne & Miller a sum equal to 7½ per cent. on $13,070.15, principal of tax hereby found delinquent and unpaid, to wit, the sum of $980.26, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent unpaid tax, to wit, the sum of $326.75.

VI.

As to the sixth cause of action in the amended complaint, the court finds that all the allegations of said sixth cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action, is as to Langhorne & Miller a sum equal to 7½ per cent. on $2,944.11, principal of tax hereby found

delinquent and unpaid, to wit, the sum of $220.80, and as to A. R. Cotton a sum equal to 2½ per cent. on said principal sum of delinquent unpaid tax, to wit, the sum of $76.61.

235 VII.

As to the seventh cause of action in the amended complaint, the court finds that all the allegations of said seventh cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action is, as to Langhorne & Miller, a sum equal to 7½ per cent. on $30,468.56, principal of tax hereby found delinquent and unpaid, to wit, the sum of $2,285.14, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent unpaid tax, to wit, the sum of $761.71.

VIII.

As to the eighth cause of action in the amended complaint, the court finds that all the allegations of said eighth cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action is, as to Langhorne & Miller, a sum equal to 7½ per cent. on $25,432.65, principal of tax hereby found delinquent and unpaid, to wit, the sum of $1,907.45, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent unpaid tax, to wit, the sum of $635.81.

236 IX.

As to the ninth cause of action in the amended complaint, the court finds that all the allegations of said ninth cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action is, as to Langhorne & Miller, a sum equal to 7½ per cent. on $1,363.45, principal of tax hereby found delinquent and unpaid, to wit, the sum of $102.26, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent unpaid tax, to wit, the sum of $34.08.

X.

As to the tenth cause of action in the amended complaint, the court finds that all the allegations of said tenth cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action, is, as to Langhorne & Miller a sum equal to 7½ per cent. on $934.14, principal of tax hereby found

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delinquent and unpaid, to wit, the sum of $70.06, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent unpaid tax, to wit, the sum of $23.35.

237 XI.

As to the eleventh cause of action in the amended complaint, the court finds that all the allegations of said eleventh cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action is, as to Langhorne & Miller a sum equal to 7½ per cent. on $3,208.42, principal of tax hereby found delinquent and unpaid, to wit, the sum of $240.63, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent, unpaid tax, to wit, the sum of $80.21.

XII.

As to the twelfth cause of action in the amended complaint, the court finds that all the allegations of said twelfth cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action is, as to Langhorne & Miller, a sum equal to 7½ per cent. on $5,395.24, principal of tax hereby found delinquent and unpaid, to wit, the sum of $404.64, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent, unpaid tax, to wit, the sum of $134.88.

238 XIII.

As to the thirteenth cause of action in the amended complaint, the court finds that all the allegations of said thirteenth cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action is, as to Langhorne & Miller, a sum equal to 7½ per cent. on $406.68, principal of tax hereby found delinquent and unpaid, to wit, the sum of $30.50, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent, unpaid tax, to wit, the sum of $10.16.

XIV.

As to the fourteenth cause of action in the amended complaint, the court finds that all the allegations of said fourteenth cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action is, as to Langhorne & Miller, a sum equal to 7½ per cent. on $10,003.35, principal of tax

and disbursements, incurred in this action, amounting to the sum of $42.16.

Judgment recorded February 3rd, 1893, B. 18, p. 132.

Statement on Motion for New Trial.

On the 19th day of June, 1893, defendant duly filed its approved, allowed and settled statement on motion for new trial herein as follows:

(Title of Court and Cause.)

The above-entitled action came on regularly to be tried by the court, without a jury, on January 9th, 1893, W. H. H. Hart, attorney general, Langhorne & Miller and A. R. Cotton appearing as counsel for plaintiff, and J. E. Foulds and Foshay Walker appearing as counsel for defendant; whereupon the following proceedings, and none other, were had:

252 W. W. DOUGLAS was called and sworn on behalf of plaintiff and testified that he is, and, since the 8th day of January, 1891, has been the deputy comptroller of State.

The witness produced and identified, at the request of counsel for plaintiff, the duplicate record of assessments of railways by the State board of equalization for the year 1887, as an original record produced by him from the office of the comptroller of state of the State of California, which said duplicate record was duly certified by the chairman and clerk of said State board of equalization, which said duplicate record was also duly certified by the controller of State as having been received by him from said board of equalization and filed in his office October 11th, 1887, said duplicate record and certificates being attached together in book form. For identification said book was marked "Plaintiff's Exhibit 1."

Counsel for plaintiff offered in evidence all that portion of Plaintiff's Exhibit 1 relating to the assessment of the property of the defendant for the year 1887, together with said certificates.

Objected to by defendant as incompetent, irrelevant and immaterial; that said assessment is not in accordance with the requirements of the constitution, because the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad are assessed as a unit and not separately, and said assessment does not contain any of the matters and things required by section 3670 of the Political Code to make it *prima facie* evidence in this case.

253 The objection was overruled by the court, to which ruling defendant then and there duly excepted.

Said portion of said Exhibit 1, so admitted in evidence, is as follows: except said certificates, which were in all respects sufficient, and in due form, and are here omitted by consent.

EXHIBIT 1.

Record of Assessments of Railways by the State Board of Equalization for 1887.

The State board of equalization, being in session on this the thirteenth day of August, 1887, all the members being present,

and having under consideration the assessment of the franchise, roadway, road-bed, rails and rolling stock of the Southern Pacific Railroad Company within the State, for the year 1887, and it appearing to this board that said company, on the first Monday in March, in the year 1887, at 12 o'clock meridian of that day, owned and still owns 1,022.33 miles of railroad within this State, which at said time and day in March was, and still is, operated in more than one county, being the entire railway of said company within this State, and which, with the right of way for the same, is described as follows:

Line of roadway, road-bed and rails, and right of way for the same, beginning in the city of San Francisco, at depot in 100-vara lot 165, E. corner Fourth and Townsend streets, *in* running southwesterly across Fourth street, into Townsend street;
254 thence southwesterly along Townsend street, to northwest corner of North Potrero block 133; thence westerly across said corner, and through North Potrero blocks 99, 98, 69, 68, 45 and 44, to east line of block 23; thence southwesterly, through blocks 23, 21, 22, 7 and 6, to line of Harrison street, where it intersects Sixteenth; thence south and along Harrison street to its intersection of Twenty-second street; thence southwesterly, through blocks 139, 153, 154, 171, 170, 184, to west line of San Jose avenue; thence same direction through portions of blocks 6, 32, 33, 34, 57, 56, 55 and 54 to south line of Twenty-ninth street; thence southerly through blocks 53, 52 and 29 to south line of Randall street, where it intersects the old San Jose road; thence along the road southerly through San Miguel rancho to north line of Ocean House road; thence southerly through San Miguel to block 2, West End Homestead; thence southwesterly to Railroad avenue; thence along the avenue westerly to Rancho Laguna de la Merced; thence continuing southwesterly to a point on north line of section 1, township 3 south, range 6 west, Mt. Diablo base and meridian, said point being near center of said line, and intersected by the south line of the city and county of San Francisco; right of way, except through public thoroughfares, averaging 30 feet wide, being 7.36 miles in the city and county of San Francisco; thence into the county of San Mateo, and thence running southeasterly through the towns of San Bruno, San Mateo and Redwood City to a point on San
255 Francisquito creek, near the southeast corner of section 34, township 5 south, range 3 west, said base and meridian being the south line of the county, with right of way averaging 60 feet, being a distance of 25.10 miles in San Mateo county; thence into Santa Clara county; thence running southeasterly through the towns of Mayfield, Mountain View, Santa Clara to depot in city of San José; thence to Fourth street; thence with Fourth street to southeast line of city; thence southeasterly to town of Gilroy; thence in same course to Carnadero, and running southeasterly to a point near the center of northeast quarter of southeast quarter section 27, township 11 south, range 4 east, said point being on southeast line of the county, and thence into San Benito county, and running southeasterly to the town of Hollister, and thence to Tres Pinos, a distance of 15.40 miles.

Again, beginning at Carnadero, in Santa Clara county, and running south to a point near the north bank of Pajaro river, in section 5, township 12 south, range 4 east; thence west with the river to the east line of Santa Cruz county, a distance of 59.30 miles in Santa Clara county; thence westerly with the Pajaro river to the center of the railroad bridge crossing said river, a distance of 2.15 miles in Santa Cruz county; thence across a part of San Benito county, 2.25 miles, to a point on the east line of Monterey county, 400 yards east of Sandcut station, in section 16, township 12 south, range 3 east, making with the line before described, a dis-
256 tance of 17.65 miles in San Benito county; thence into Monterey county, and running westerly to Pajaro; thence southerly to a point on north bank of Elkhorn slough, near center of section 28, township 12 south, range 2 east; thence following the east bank of the slough to southwest corner of section 10, township 13 south, range 2 east; thence southerly, through Castroville and Salinas city to Soledad; thence southeasterly along the east bank of the Salinas river, and crossing the river in section 26, township 24 south, range 11 east; thence southerly to section 1, township 25 south, range 11 east, being the south line of the county, being a distance of 109.14 miles in Monterey county; thence into San Luis Obispo county; thence running easterly into and across section 6, and across section 8, to the town of San Miguel, in section 17; thence through San Miguel, southerly, to the center line of section 29, in southeast quarter of northeast quarter of said section, township 25 south, range 12 east, being a distance of 5.45 miles in San Luis Obispo county.

The above railway is designated by the company as the Northern division of the Southern Pacific railroad.

The Southern division of the Southern Pacific railroad is described as beginning at Huron, in Fresno county; thence running in a northeasterly direction to a point in the southwest quarter of southwest quarter of section 4, township 19 south, range 20 east, on
257 the southeast line of Fresno county, being 17.43 miles in Fresno county; thence into Tulare county, and thence running easterly, through the towns of Hanford and Lemoore, to the intersection of Central Pacific and Southern Pacific tracks, at Goshen; thence continuing southeasterly, to town of Tulare; thence southerly, through Tipton, to intersection of south line of the county with south line of southeast quarter of southeast quarter of section 34, township 24 south, range 25 east, being a distance of 62.48 miles in Tulare county; thence into Kern county, and running thence southerly through Delano and Poso, to Lerdo station; thence southeasterly through Sumner and Pampa to Caliente; thence through Tehachapi pass and the "Loop," to a point in section 26, township 32 south, range 35 east; thence south to Mojave; thence south to a point in southwest quarter of southeast quarter of section 33, township 9 north, range 12 west, San Bernardino base and meridian, which point is on the southerly line of Kern county, a distance of 117.83 miles in Kern county; thence into Los Angeles county, and thence running south to a point in section 8, township 5 north, range 11 west; thence southwest to Soledad pass; thence west through Soledad pass

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delinquent and unpaid, to wit, the sum of $70.06, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent unpaid tax, to wit, the sum of $23.35.

237 XI.

As to the eleventh cause of action in the amended complaint, the court finds that all the allegations of said eleventh cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action is, as to Langhorne & Miller a sum equal to 7½ per cent. on $3,208.42, principal of tax hereby found delinquent and unpaid, to wit, the sum of $240.63, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent, unpaid tax, to wit, the sum of $80.21.

XII.

As to the twelfth cause of action in the amended complaint, the court finds that all the allegations of said twelfth cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action is, as to Langhorne & Miller, a sum equal to 7½ per cent. on $5,395.24, principal of tax hereby found delinquent and unpaid, to wit, the sum of $404.64, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent, unpaid tax, to wit, the sum of $134.88.

238 XIII.

As to the thirteenth cause of action in the amended complaint, the court finds that all the allegations of said thirteenth cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action is, as to Langhorne & Miller, a sum equal to 7½ per cent. on $406.68, principal of tax hereby found delinquent and unpaid, to wit, the sum of $30.50, and as to A. R. Cotton, a sum equal to 2½ per cent. on said principal sum of delinquent, unpaid tax, to wit, the sum of $10.16.

XIV.

As to the fourteenth cause of action in the amended complaint, the court finds that all the allegations of said fourteenth cause of action are true, except as to counsel fees the court finds that a reasonable compensation for legal services rendered by plaintiff's counsel, Messrs. Langhorne & Miller and A. R. Cotton, in the institution and prosecution of said cause of action is, as to Langhorne & Miller, a sum equal to 7½ per cent. on $10,003.35, principal of tax

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and disbursements, incurred in this action, amounting to the sum of $42.16.

Judgment recorded February 3rd, 1893, B. 18, p. 132.

Statement on Motion for New Trial.

On the 19th day of June, 1893, defendant duly filed its approved, allowed and settled statement on motion for new trial herein as follows:

(Title of Court and Cause.)

The above-entitled action came on regularly to be tried by the court, without a jury, on January 9th, 1893, W. H. H. Hart, attorney general, Langhorne & Miller and A. R. Cotton appearing as counsel for plaintiff, and J. E. Foulds and Foshay Walker appearing as counsel for defendant; whereupon the following proceedings, and none other, were had:

252 W. W. DOUGLAS was called and sworn on behalf of plaintiff and testified that he is, and, since the 8th day of January, 1891, has been the deputy comptroller of State.

The witness produced and identified, at the request of counsel for plaintiff, the duplicate record of assessments of railways by the State board of equalization for the year 1887, as an original record produced by him from the office of the comptroller of state of the State of California, which said duplicate record was duly certified by the chairman and clerk of said State board of equalization, which said duplicate record was also duly certified by the controller of State as having been received by him from said board of equalization and filed in his office October 11th, 1887, said duplicate record and certificates being attached together in book form. For identification said book was marked "Plaintiff's Exhibit 1."

Counsel for plaintiff offered in evidence all that portion of Plaintiff's Exhibit 1 relating to the assessment of the property of the defendant for the year 1887, together with said certificates.

Objected to by defendant as incompetent, irrelevant and immaterial; that said assessment is not in accordance with the requirements of the constitution, because the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad are assessed as a unit and not separately, and said assessment does not contain any of the matters and things required by section 3670 of the Political Code to make it *prima facie* evidence in this case.

253 The objection was overruled by the court, to which ruling defendant then and there duly excepted.

Said portion of said Exhibit 1, so admitted in evidence, is as follows: except said certificates, which were in all respects sufficient, and in due form, and are here omitted by consent.

EXHIBIT 1.

Record of Assessments of Railways by the State Board of Equalization for 1887.

The State board of equalization, being in session on this the thirteenth day of August, 1887, all the members being present,

and having under consideration the assessment of the franchise, roadway, road-bed, rails and rolling stock of the Southern Pacific Railroad Company within the State, for the year 1887, and it appearing to this board that said company, on the first Monday in March, in the year 1887, at 12 o'clock meridian of that day, owned and still owns 1,022.33 miles of railroad within this State, which at said time and day in March was, and still is, operated in more than one county, being the entire railway of said company within this State, and which, with the right of way for the same, is described as follows:

Line of roadway, road-bed and rails, and right of way for the same, beginning in the city of San Francisco, at depot in 100-vara lot 165, E. corner Fourth and Townsend streets, *in* running southwesterly across Fourth street, into Townsend street;
254 thence southwesterly along Townsend street, to northwest corner of North Potrero block 133; thence westerly across said corner, and through North Potrero blocks 99, 98, 69, 68, 45 and 44, to east line of block 23; thence southwesterly, through blocks 23, 21, 22, 7 and 6, to line of Harrison street, where it intersects Sixteenth; thence south and along Harrison street to its intersection of Twenty-second street; thence southwesterly, through blocks 139, 153, 154, 171, 170, 184, to west line of San Jose avenue; thence same direction through portions of blocks 6, 32, 33, 34, 57, 56, 55 and 54 to south line of Twenty-ninth street; thence southerly through blocks 53, 52 and 29 to south line of Randall street, where it intersects the old San Jose road; thence along the road southerly through San Miguel rancho to north line of Ocean House road; thence southerly through San Miguel to block 2, West End Homestead; thence southwesterly to Railroad avenue; thence along the avenue westerly to Rancho Laguna de la Merced; thence continuing southwesterly to a point on north line of section 1, township 3 south, range 6 west, Mt. Diablo base and meridian, said point being near center of said line, and intersected by the south line of the city and county of San Francisco; right of way, except through public thoroughfares, averaging 30 feet wide, being 7.36 miles in the city and county of San Francisco; thence into the county of San Mateo, and thence running southeasterly through the towns of San Bruno, San Mateo and Redwood City to a point on San
255 Francisquito creek, near the southeast corner of section 34, township 5 south, range 3 west, said base and meridian being the south line of the county, with right of way averaging 60 feet, being a distance of 25.10 miles in San Mateo county; thence into Santa Clara county; thence running southeasterly through the towns of Mayfield, Mountain View, Santa Clara to depot in city of San José; thence to Fourth street; thence with Fourth street to southeast line of city; thence southeasterly to town of Gilroy; thence in same course to Carnadero, and running southeasterly to a point near the center of northeast quarter of southeast quarter section 27, township 11 south, range 4 east, said point being on southeast line of the county, and thence into San Benito county, and running southeasterly to the town of Hollister, and thence to Tres Pinos, a distance of 15.40 miles.

Again, beginning at Carnadero, in Santa Clara county, and running south to a point near the north bank of Pajaro river, in section 5, township 12 south, range 4 east; thence west with the river to the east line of Santa Cruz county, a distance of 59.30 miles in Santa Clara county; thence westerly with the Pajaro river to the center of the railroad bridge crossing said river, a distance of 2.15 miles in Santa Cruz county; thence across a part of San Benito county, 2.25 miles, to a point on the east line of Monterey county, 400 yards east of Sandcut station, in section 16, township 12 south, range 3 east, making with the line before described, a dis-
256 tance of 17.65 miles in San Benito county; thence into Monterey county, and running westerly to Pajaro; thence southerly to a point on north bank of Elkhorn slough, near center of section 28, township 12 south, range 2 east; thence following the east bank of the slough to southwest corner of section 10, township 13 south, range 2 east; thence southerly, through Castroville and Salinas city to Soledad; thence southeasterly along the east bank of the Salinas river, and crossing the river in section 26, township 24 south, range 11 east; thence southerly to section 1, township 25 south, range 11 east, being the south line of the county, being a distance of 109.14 miles in Monterey county; thence into San Luis Obispo county; thence running easterly into and across section 6, and across section 8, to the town of San Miguel, in section 17; thence through San Miguel, southerly, to the center line of section 29, in southeast quarter of northeast quarter of said section, township 25 south, range 12 east, being a distance of 5.45 miles in San Luis Obispo county.

The above railway is designated by the company as the Northern division of the Southern Pacific railroad.

The Southern division of the Southern Pacific railroad is described as beginning at Huron, in Fresno county; thence running in a northeasterly direction to a point in the southwest quarter of southwest quarter of section 4, township 19 south, range 20 east, on
257 the southeast line of Fresno county, being 17.43 miles in Fresno county; thence into Tulare county, and thence running easterly, through the towns of Hanford and Lemoore, to the intersection of Central Pacific and Southern Pacific tracks, at Goshen; thence continuing southeasterly, to town of Tulare; thence southerly, through Tipton, to intersection of south line of the county with south line of southeast quarter of southeast quarter of section 34, township 24 south, range 25 east, being a distance of 62.48 miles in Tulare county; thence into Kern county, and running thence southerly through Delano and Poso, to Lerdo station; thence southeasterly through Sumner and Pampa to Caliente; thence through Tehachapi pass and the "Loop," to a point in section 26, township 32 south, range 35 east; thence south to Mojave; thence south to a point in southwest quarter of southeast quarter of section 33, township 9 north, range 12 west, San Bernardino base and meridian, which point is on the southerly line of Kern county, a distance of 117.83 miles in Kern county; thence into Los Angeles county, and thence running south to a point in section 8, township 5 north, range 11 west; thence southwest to Soledad pass; thence west through Soledad pass

to Newhall; thence southeasterly to San Fernando, to depot in city of Los Angeles; running thence south, through Florence to Wilmington; thence skirting west side of San Pedro bay, to depot at Fayal.

Again, beginning at depot in city of Los Angeles, and run-
258 ning thence easterly to a point on the east line of the county, in the northeast quarter of northeast quarter of section 28, township 1 south, range 8 west, San Bernardino base and meridian, a distance of 142.48 miles, in Los Angeles county; thence into San Bernardino county, running thence east, through township 1 south, ranges 7, 6, 5 and 4, west, to Mound City station; thence southeasterly, through San Gorgonio pass to a point on north line of San Diego county, intersected by northeast quarter of southwest quarter section 9, township 3 south, range 1 east, entering San Diego county, and emerging therefrom at a point on north line of San Diego county, in southwest quarter of northeast quarter section 11, township 3 south, range 1 east; thence running east to a point on said line of San Diego county, in southeast quarter of northwest quarter section 7, township 3 south, range 2 east, townships and ranges being San Bernardino base and meridian, a distance on this division of 54.60 miles in San Bernardino county; and thence running into San Diego county, at a point on the north line of San Diego county, in the northeast quarter of southwest — of section 9, township 3 south, range 1 east; thence easterly, curving southerly, and entering San Bernardino county at a point on the north line of the county, in the southwest quarter of northwest quarter of section 11, township 3 south, range 1 east.

Again, entering San Diego county at a point on the north line of
259 the county, in southeast quarter of northwest quarter of section 7, township 3 south, range 2 east; thence running southeasterly through Indio, Seven Palms and Palm Creek station, to the Colorado river, in southwest quarter of southeast quarter, section 26, township 16 south, range 22 east, townships and ranges San Bernardino base and meridian, being 158.85 miles in San Diego county.

The description of the Colorado division of the Southern Pacific railroad is as follows: Beginning at Mojave, in Kern county, in township 11 north, range 12 west, running easterly through township 11, ranges 12, 11, 10, 9, 8, 7, west, to a point on west line San Bernardino county, in northeast quarter of northwest quarter section 4, township 10 north, range 7 west, townships and ranges of San Bernardino base and meridian, being 35.74 miles in Kern county, making a total of 153.47 miles in Kern county; thence entering San Bernardino county, and running in a general easterly and southeasterly direction through Cramer, Daggett and Haslett, to a point in southwest quarter section 3, township 7 north, range 7 east; thence continuing in same general course through Ludlow and Aubrey to center of Colorado river, at Needles, townships and ranges San Bernardino base and meridian, being in this division 206.87 miles in San Bernardino county, making a total distance of 261.47 miles in San Bernardino county.

The townships and ranges, where not expressed, are of Mt. Diablo base and meridian; the right of way, in width, except on public

thoroughfares, is as follows: Los Angeles, for 115 miles 100
260 feet; 21 miles, 50 feet; San Francisco, 30 feet; San Mateo, 60 feet; Santa Clara, for 18 miles, 60 feet; 40 miles, 100 feet; all other counties, 100 feet.

And it appearing that the actual value of the franchise, roadway, road-bed, rails and rolling stock of said company, within this State, at the said date and time in March, was, and still is, the sum of sixteen million five hundred thousand dollars;

Therefore, it is hereby ordered that the said franchise, roadway, road-bed, rails and rolling stock, for the year 1887, be and the same are hereby assessed to the said Southern Pacific Railroad Company at the sum of sixteen million five hundred thousand dollars.

C. E. WILCOXEN, *Chairman.*
E. W. MASLIN, *Clerk.*

At the request of counsel for plaintiff, the witness then produced and identified a book as the duplicate record of apportionment of railway assessments from the office of the comptroller of State of the State of California for the year 1887, which was marked for identification as "Plaintiff's Exhibit 2," which said duplicate record was duly certified by the chairman and clerk of said State board of equalization, and was also duly certified by the controller of State as having been received by him from said board of equalization, and filed in his office on October 11th, 1887, said duplicate record certificates being attached together in book form and constituting said Exhibit 2.

Counsel for plaintiff then offered in evidence all that por-
261 tion of Plaintiff's Exhibit 2 having reference to the apportionment of the assessment of the property of defendant for the year 1887, together with said certificates; said portion of said duplicate record so offered was as follows except said certificates, which were in all respects sufficient and in due form, and are here omitted by consent.

Duplicate Record of Apportionment of Railway Assessments for 1887.

OFFICE OF STATE BOARD OF EQUALIZATION,
SACRAMENTO, *August 22nd,* 1887.

The State board of equalization met this day. All the members present. The board this day apportioned the total assessment of the franchise, roadway, road-bed, rails and rolling stock of each railroad assessed by it on the 13th day of August, 1887, for the year 1887, to the counties and the city and county of San Francisco, in proportion to the number of miles of railway laid in each county, and in the city and county of San Francisco, which apportionment is set out in the following table.

The apportionment is based upon the proportion the number of miles in each county of a railway bears to the total number of miles of such railway laid in the State. * *

Witness our hands.

E. W. MASLIN,
Clerk of the State Board of Equalization.
C. E. WILCOXEN,
Chairman State Board of Equalization.

262 *Duplicate Record of Apportionment*

Name of the corporation or person to whom each railway is assessed.	Name of each railway assessed by the State board of equalization.	Name of the county and city and county to which the assessment of each railway is apportioned by the board.	Number of miles of railway operated in the State.	Number of miles of each railway in each county and city and county.	Total value per mile of each railway.	Total assessment of the franchise, roadway, road-bed, rails, and rolling stock of each railway assessed for purposes of State taxation.
Southern Pacific Railroad Company.	Southern Pacific.	.....	1,022.33	.....	$16,139 60	$16,500,000
		Fresno.....		17.43		
		Kern		153.47		
		Los Angeles.....		142.48		
		Monterey		109.14		
		San Benito		17.65		
		San Bernardino...		261.47		
		San Diego.....		158.85		
		San Francisco.....		7.36		
		San Luis Obispo...		5.45		
		San Mateo.....		25.10		
		Santa Clara.....		59.30		
		Santa Cruz.....		2.15		
		Tulare.....		62.48		

Amount of the assessment of each railway apportioned by the board to each county and city and county for purposes of county and city and county taxation.	Rate of taxation for each county and city and county levied by the board of supervisors.	Amount due for State taxes upon the whole assessment by each corporation or person assessed for railway. State rate: $0.60.8 on each $100.00.	Amount due of county and city and county taxes upon the assessment apportioned to each county and city and county by each corporation or person assessed for railway.	Remarks.
		† $5,016 00		
.....	.....	100,320 00		
			† $147 97	
$281,313 00	$1 05.2	.....	2,959 41	
			† 1,723 95	
2,476,945 00	1 39.2	.....	34,479 07	
			† 1,007 45	
2,299,571 00	{ 64.2 / 89.2 }	.....	20,149 03	$145,256 @ .64.2 and $2,154,315 @ .89.2.
			† 653 51	
1,761,476 00	74.2	.....	13,070 15	
			† 147 21	
284,864 00	{ 84.2 / 1 04.2 }	.....	2,944 11	$12,105 @ .84.2 and $272,759 @ 1.04.2.
			† 1,523 43	
4,220,022 00	72.2	.....	30,468 56	
			† 1,271 63	
2,563,776 00	99.2	.....	25,432 65	
			† 68 17	
118,788 00	1 14.78	.....	1,363 45	
			† 46 71	
87,961 00	1 06.2	.....	934 14	
			† 160 42	
405,104 00	79.2	.....	3,208 42	
			† 264 76	
957,078 00	{ 20.2 / 59.2 }	.....	5,395 24	$90,220 @ .29.2 and $866,858 @ .59.2.
			† 20 33	
34,700 00	1 17.2	.....	406 68	
			† 500 17	
1,008,402 00	99.2	.....	10,003 35	† 251,134.26 and $12,556.71 5 %.
			† 150,814 26	

NOTE.—The figures in the foregoing exhibit marked with a † are interlined upon the original record in lead pencil at the places shown above.

264 Said Exhibit 2 contained the duplicate record of the apportionment of the assessments for 1887, of all the railways in the State operated in more than one county, and in the last column under heading of "Remarks" the State and county, and city and county taxes were stamped in ink as paid as to many of the railroads, but the State and county, and city and county taxes therein alleged to be due by this defendant had not been in any manner marked paid anywhere on said Exhibit 2.

Mr. HART (to counsel for defendant): Do you make any question as to the apportionment of the different mileages to the different counties?

Mr. FOULDS: I think so far as the mileage to the counties is concerned that we have no objection.

Mr. LANGHORNE: Or the apportionment to them?

Mr. FOULDS: No, sir.

Mr. HART: You admit the allegations in the complaint as to the apportionment to the counties?

Mr. FOULDS: We do not complain of that. Now, in making that admission, I do not want to be understood as consenting to the constitutionality of the statute providing for apportionments. The figures probably state the correct mileage for each county. We
265 admit that this apportionment is made as the Political Code requires it to be made, and the mileage to each county is correctly stated. That is all that you wish us to admit.

Counsel for defendant objected to the introduction of said record upon the ground that the evidence is incompetent, irrelevant and immaterial; that the apportionment, as shown by this record, is not in accordance with the provisions of section 10, article XIII, of the constitution of the State of California, in this, that upon the face of the record it appears that there is no apportionment to any subdivisions of counties, nor does the record show that there are any unpaid taxes due from the defendant; that the record is inadmissible for any purpose, because it is based upon a system which has been declared by the supreme court of this State to be special legislation for the collection of railroad taxes, and therefore unconstitutional and void.

The objections were overruled by the court, to which ruling defendant then and there duly excepted. Said duplicate record of apportionment of railway assessments and said certificates were admitted and read in evidence.

By Mr. LANGHORNE:

Q. Have any of the taxes assessed against the Southern Pacific Railroad Company, mentioned in the duplicate records produced by you from the State comptroller's office, been paid?

To this question defendant's counsel objected, on the ground that the record is the only evidence under the statute that can
266 be received of the payment of taxes, or of the non-payment of them, and that oral testimony thereon is incompetent.

The objection was overruled by the court, to which ruling defendant then and there duly excepted.

A. No, sir; the taxes have not been paid.

Q. Or any portion of the taxes, or the interest, or the penalty?

To this question defendant's counsel objected upon the same grounds as stated in the last objection.

The objection was overruled by the court, to which ruling defendant then and there duly excepted.

A. No, sir.

Counsel for plaintiff announced to the court that they would proceed to offer evidence as to the value of counsel fees, under the provisions of section 3670 of the Political Code of the State of California.

Counsel for defendant objected to the introduction of any evidence upon the subject of counsel fees as incompetent, irrelevant and immaterial, which objection was overruled by the court, and to which ruling defendant then and there duly excepted.

And by stipulation it was understood that all evidence on the subject of counsel fees was taken subject to the foregoing objection and exception.

267 It was further stipulated that such testimony should be considered as applicable to the six cases of like character, pending before this court, to wit: the case at bar; The People of the State of California *vs.* Central Pacific Railroad Company, No. 28424, involving a claim for the principal sum of $295,740.71; The People of the State of California *vs.* Northern Railway Company, No. 28426, involving a claim for the principal sum of $41,483.45; The People of the State of California *vs.* The San Pablo and Tulare Railroad Company and Southern Pacific Railroad Company, No. 28427, involving a claim for the principal sum of $11,886.85; The People of the State of California *vs.* California Pacific Railroad Company, No. 28428, involving a claim for the principal sum of $37,015.45; and The People of the State of California *vs.* South Pacific Coast Railway Company, No. 28429, involving a claim for the principal sum of $10,178.48.

J. P. LANGHORNE was called and sworn as a witness for plaintiff.

By Mr. MILLER:

Q. Mr. Langhorne, were you employed as one of the special counsel for the State in the prosecution of these tax suits against the various railroads that are on trial now?

A. Yes, sir; the firm of Langhorne & Miller was employed by the State comptroller, at the time these suits were first commenced, to institute these six actions. I understand this testimony is applicable to all six cases.

By Mr. MILLER:

268 Q. Now, will you please go on and tell me if Langhorne & Miller took charge of the cases and what they did in the prosecution of them from that time up to the present?

A. They were placed in our charge for the purposes of prosecution some time in January, 1890. On January 28th, 1890, the original complaints were filed in each one of these cases. As there was then pending, upon appeal, in the supreme court of this State, cases involving taxation of the same roads for the year 1886, nothing was done until the decision of the supreme court in those cases. I refer to the decision of the supreme court in the case of People *vs.* Central Pacific Railroad Company in 83 California Reports. I was then called to Sacramento by the attorney general and had a consultation with him and the then comptroller, and, under his instructions, drew the amended complaints which are now filed in these six cases. The preparation of these amended complaints was extremely arduous for the reason that the supreme court seemed to require something that had not been required before in its cases, namely, an allegation in regard to every fact that had been done in regard to the assessment and levy of the taxes and delinquency, and these allegations had to be repeated in regard to each cause of action, and a separate cause of action stated in regard to each county through which the railroad of any one of these defendants ran. And we would accumulate the evidence, not only of the acts of the different boards and officers, but we also had to get
a description of the road in the whole State, and that in
269 each of the counties. That was done in each of the cases, and the cases came up on demurrer to the amended complaint before the late Judge Hoge. The demurrer interposed by the defendants against us, which is of record, raised a great many questions of law, not only in regard to the provisions of our State constitution and the State statute, but also in regard to the alleged violation of the fourteenth amendment to the Federal Constitution. I prepared myself in regard to all of these matters and prepared a brief. During all this time we were in consultation with the then Attorney General Johnson, and, subsequently, with the present Attorney General Hart, to whom we made full reports. I also participated in the oral arguments of these demurrers, and after they were disposed of I prepared the cases for trial. At that time the demurrers came on before Judge Hebbard, after Judge Hoge's death. Mr. Cotton also came in and filed a brief for the attorney general and participated in that matter, and I prepared the cases for the trial which is now going on.

Q. About how many times were you at Sacramento?

A. I have been to Sacramento, I suppose, altogether, a half dozen times. I cannot tell how many—perhaps a half dozen or ten times, in connection with the evidence in the cases, and preparing the cases for trial, and going over the records, and so on.

Q. What did you do in Sacramento, in regard to the cases?

270 A. I examined the records of the comptroller's office and State board of equalization in regard to the evidence, and also, I had several consultations with Mr. Dunn, who was the former comptroller, and an important witness in the matter, as to the proceedings before the State board of equalization. I will say that, in addition to those services and the services on this trial,

are the services upon the preparation of findings in the case or of any bill of exceptions on appeal that will have to be rendered in this case before its final determination.

Q. What did you do with regard to the matter of preparing these cases for trial?

A. Well, as I stated, I have looked up questions of law involved, which cover a variety of questions, all of which, or a good many of which, have been already argued before this court. Of course, there are certain questions of fact which have been raised on this trial, which have not come before this court as yet. I will state that I was particularly careful in the preparation of the cases and devoted special attention on account of the fact that prior cases seem to have been disposed of—that is, the cases prior to 1886—in the United States circuit court, upon certain findings which were claimed by certain officers of the State, not to have been correct.

Q. Did you examine all the records in the circuit court of the United States, where these cases were?

A. I did. I examined all the records in the courts of the
271 United States that were presented in the prior cases in regard to all the questions, because all of these questions had a bearing upon these cases.

Q. To what extent did you look up the law involved in these cases?

A. Well, I cannot state now exactly the exact amount of time that I took, nor the exact number of books, but I think I can state that I went over all the decisions I could find in the digest—all I could find in regard to them which I thought had a bearing upon them.

By Attorney General HART:

Q. How many times have briefs been filed, Mr. Langhorne, in this case, by counsel for the people?

A. I think there have been about four briefs filed altogether.

Q. How many have you filed?

A. I have filed one brief upon the demurrer.

Q. Did not you file one before Judge Hoge?

A. Yes, sir.

Q. And also one before his honor?

A. Well, I supplemented my brief before Judge Hoge with the same one I filed before his honor here. It was the same question involved here.

Q. And the attorney general filed two briefs and Judge Cotton one?

A. Yes, sir.

Q. Well, what in your judgment is the percentage that should be allowed as compensation in this case? What would be a reasonable compensation in this case?

272 By the COURT:

Q. First, what is the amount sought here by this plaintiff in round numbers?

Attorney General HART: Well, there are six cases. The exact amount is $647,439.20, as the principal of the delinquent taxes.

Q. Now, I will ask you, Mr. Langhorne, considering that there are six cases, and the magnitude of the work that has been done in them, as you know of your own knowledge, the amount involved being $647,439.20, what would you say would be a reasonable compensation for attorneys' fees—counsel fees?

A. Well, I think, considering the amount of work I have performed, and the amount involved and the responsibility, that a reasonable amount would be at least ten per cent., which is the usual amount in tax cases, as I understand.

Q. And in that you include the compensation of all counsel and not for the attorney general—of course, he has a salary?

A. Well, I am only testifying as to what our firm should get.

Q. I mean for the services of the attorney general.

A. Well, I could not testify as to that. I have only testified in regard to what our firm did. I have not testified as to what the attorney general did.

Q. Well, I want to make that distinction. I do not know that I am entitled to anything and I don't believe I am.

273 Cross-examination.

By Mr. FOULDS:

Q. Is your estimate of ten per cent. what you considered to be the reasonable value for services which your firm alone has performed in these tax cases?

A. Yes, sir. The former firm of Langhorne & Miller; though in regard to these cases our firm continues.

Q. Well, there are six cases, but they all practically involve about the same issue. The preparation of one case, say the Southern Pacific case, would practically be a preparation of the whole of them?

A. Not altogether. In the Southern Pacific case there are different acts of Congress and different questions.

Q. And all the six cases involve very much less labor than if they had been six cases involving different facts and principles of law?

A. Yes, sir.

Q. Now, on what theory do you base your determination that ten per cent. is a reasonable estimate for the firm of Langhorne and Miller?

A. I base it upon the amount of labor expended, the amount of responsibility upon the firm, the amount involved in the suits. I think the responsibility is measured by that and the importance of the cases.

Q. The responsibility is shared, to a considerable extent, by the attorney general, is it not?

A. Well, it is of course, to a certain extent; yes sir.

274 Q. To a very large extent?

A. But I think when he gives a case to private counsel

that their responsibility is even greater or more than the attorney general's, because they have the direct handling of the case, and, if anything goes wrong, why he can lay it on them.

D. M. DELMAS, called and sworn as a witness for plaintiff, testified as follows:

By Attorney General HART:

Q. Mr. Delmas, you are a practicing attorney-at-law, and have been for several years last past in San Francisco?

A. Yes, sir.

Q. You also had something to do with the tax cases of 1885 and 1886, did you not, so that you know something of railroad tax litigation?

A. I would not be certain as to the year. The first part of your question involves 1885 and 1886. As to the second part of your question, I can answer affirmatively, I do.

By the COURT: I would suggest, gentlemen, that Mr. Delmas heard the statement of Mr. Langhorne as to what was involved in these cases.

A. I think so.

By Attorney General HART:

Q. The amount involved being in the six cases $647,439.20, now state to the court if you have an opinion as to what would be a reasonable attorney's fee to charge in these cases, the de-
275 fendants having filed voluminous answers attacking the tax by virtue of the Federal franchise having been assessed, and also that discrimination was used against the railroad in making the assessment; and those matters having been all examined into and some seven briefs having been filed in the case, and having been orally argued twice on the demurrer before the court, and now tried, can you state what would be a reasonable fee.

Mr. FOULDS: I understand that you include all the services that have been performed both by yourself, Mr. Cotton, Mr. Langhorne and Mr. Miller. Does your question go to the counsel fees of all?

Attorney General HART: Yes, sir; because I don't claim that the attorney general is entitled to any, but the other counsel is entitled to his fee because he has to take the responsibility.

A. You have asked me if I was familiar with this litigation—that is with the litigation that has been going on for ten years past. I am answering that question as to all the matters involved.

Q. Yes; in answer to what I have stated to you on the subject.

A. I understand that the fee in these cases is purely contingent?

Q. Yes, sir.

A. The State don't claim to be responsible unless the State wins, and the compensation for the services is not to be fixed until the final determination of the case?

276 Q. I believe that is correct.

A. Twenty-five per cent. of the amount involved would, in my judgment, be a reasonable fee.

Q. And when you say twenty-five per cent., do you mean of the principal, or after the interest and costs are added?

A. I mean the whole amount, including that, because whether interest is recoverable or not has been a very mooted question in these cases, and a very difficult one.

Cross-examination:

On cross-examination the witness testified as follows:

By Mr. FOULDS:

Q. Mr. Delmas, if this fee were not contingent, but were a fee based upon the value of the services rendered in these cases up to the present time?

A. I did not catch your question.

Q. Suppose this fee were not a contingent fee, but were a cash fee, to be fixed according to the value of the services rendered by these gentlemen in these cases up to the present time, what would be your judgment as to the compensation?

A. A cash fee?

Q. Yes; certainly.

A. I should judge about twenty-five thousand dollars would be a reasonable fee.

By Attorney General HART:

Q. For the six cases?

277 A. Well, all the questions involved in the six cases, the important questions, are kindred, as I understand it. The great questions involved being the questions arising under the fourteenth amendment to the Federal Constitution, and the Federal franchise, and the correctness of the assessment and its legality, etc.

Q. There is also involved in this case the correctness of each levy made by the different counties through which the road passed?

A. I take that into consideration.

By Mr. FOULDS:

Q. Your estimate, dealing with this fee as a contingent fee, was based upon a consideration of the entire services of all the counsel for the plaintiff, The State of California, in these cases?

A. It was.

Q. Now, I understand that Mr. Langhorne was testifying as to the value of the services performed by his firm as special counsel. Now, limiting it to those services, the services of special counsel in the case, what would be your judgment as to a reasonable fee in the matter?

A. It is impossible for me to determine that, sir; because I assumed, in the fixing of the fee, the contingent fee. I had stated that

the cases being conducted by competent counsel, of whom, of course, Mr. Langhorne and Mr. Miller formed part, that they co-operated with each other, and that they seek by their mutual co-operation to obtain a general result. I have no means, unless I could examine in detail the work performed by each counsel, of segregating and apportioning the fee. Briefs have been spoken of here. I
278 have not seen those briefs, and I do not know how much ground they cover or how much labor they have involved, or what questions they discuss.

AYLETT R. COTTON, called and sworn as a witness for plaintiff, testified as follows:

By Mr. LANGHORNE:

Q. Judge Cotton, you have rendered services in these six cases now before the court?

A. I have. I would say that soon after Attorney General Hart came into office, he either wrote or telegraphed for me to go to Sacramento, and when I arrived there I found he wished to talk over this railroad-tax litigation, and we did talk the matter over there. He desired me to write a brief on the question generally, and I went to work looking up the legal propositions and the authorities, and wrote a manuscript brief generally on this question of taxation; but I have not the first brief that was filed, here, in my package of briefs by the attorney general, but I think quite a portion of that, and I think a portion of you gentlemen's briefs, is embraced in this first brief in this case. In addition to what I wrote, the attorney general embraced, to a considerable extent, in his first brief, other matters. I find two of the briefs that were filed in this case were gotten up by me; one, filed before the Hon. J. P. Hoge, which is endorsed "W. H. Hart, attorney general, and A. R. Cotton, of counsel," and another filed before Judge Hebbard, which is undoubtedly sup-
279 plemental, a reply brief of plaintiff on the demurrers to the complaint. My name was not printed to that brief by an oversight of the attorney general, but I wrote it afterwards on the brief, and I was present at the argument and participated in the argument of the demurrers.

By Attorney General HART:

Q. And also on the trial?

A. And on the trial; yes, sir. Attorney General Hart spoke to me to take a hand generally in these railroad-tax suits at that time, in the early part of 1891, in the early part of his administration, and ever since that time I have given the legal proposition a good deal of attention.

Q. Now, Judge Cotton, what, in your opinion, would be the reasonable value of the services?

A. Well, I have not thought. I had thought this in regard to the fees in these cases, you gentlemen, Messrs. Langhorne & Miller, had done a great deal of work before I came into the case, and a large part of the work since, and I thought that we would not dis-

agree as to any division of it. I do not know whether his honor can make a separate finding of fees for different counsel in the case, and I have not thought of this question at all, as to what would be right so far as I am concerned. Of course, as Mr. Delmas says, these fees are contingent, and I expect to participate in any further work that needs to be done in the cases—anything that has to be done in the future, and I am willing to leave it to the court hereafter, or to the attorney general, as to what would be fair so far as I am concerned.

280 Q. What do you think that the fees of all the special counsel together would be—a reasonable fee?

A. Well, I would prefer not expressing an opinion, as I am somewhat interested. You gentlemen have expressed your opinions.

Mr. LANGHORNE:

Q. I expressed an opinion of ten per cent.; do you think that too low or too high?

A. Well, I should think ten per cent. was adequate.

Q. You mean for all the counsel? I mean, ten per cent. for the services of Langhorne & Miller.

Mr. FOULDS: Do you include Judge Cotton in that?

Mr. LANGHORNE: No, sir; my testimony was only in regard to the services we had rendered.

The WITNESS: Well, I prefer leaving the amount of fees to his honor. Mr. Delmas has testified and you have testified. I would not like to undertake to fix a sum.

The COURT: Do I understand that your services were as special counsel, or in connection with the attorney general's office?

Attorney General HART: Special counsel.

A. Well, as special counsel. I am not a deputy or anything of that kind. I am entirely independent of his office.

281 Attorney General HART:

Q. Well, what do you think your fees were worth, Judge? Just mention that, what per cent.?

Mr. FOULDS: I don't know that that is a proper way to put the question.

Attorney General HART:

Q. What per cent. do you say, Judge, for your services for all the cases combined?

A. Two and a half per cent.

Mr. FOULDS:

Q. Suppose that you had performed the same labor and done the same things as you have done professionally in these cases for a private individual, who desired you to make out your bill to him, and intended to pay you in cash, what would you have charged him for the work you have done, without any contingency, or anything of that kind, in it—simply for your services up to date?

Attorney General HART: That includes all of your services for the tax of 1887?

Mr. FOULDS: All of his services in these suits.

The COURT: Two and a half per cent. is about $16,000.

A. As an absolute cash payment, if a man wanted to pay me the cash now, and I agreed to attend to the cases until I was through?

Attorney General HART:

Q. My question is all services up to the end of the trial of these cases, up to the judgment in these cases?

A. Up to the end of the trial in these cases?

282 Q. All services that you have heretofore performed and all services that you will perform, unless the court renders judgment in this case.

A. Well, an absolute cash fee—I would be satisfied with $5,000—that is unconditionally.

Q. Now, in your estimate of two and a half per cent., do you include all services you may have hereafter to render in case of an appeal to the Supreme Court or a writ of error to the Supreme Court of the United States in any case where these suits might be involved?

A. Yes, sir; I included all services.

Attorney General HART:

Q. Well, do you include a trip to Washington?

A. No, sir, I do not. I include, though, the preparation of the papers necessary for an appeal.

Q. Then, your estimate of two and a half per cent. is very largely speculative, as to what proceedings may be taken in these cases after his honor here renders judgment?

A. No, sir; it is not speculative, because it is largely hypothetical when this money may come in, or what may be the result of these suits, or when it may be paid.

Q. Well, the largest figure that you spoke of is estimated, to some extent, upon the possibility of such litigation in the future?

A. Well, on the uncertainties of when there will be any fee paid.

Mr. FOULDS: Well, I don't think that is an element.

Attorney General HART: It is only an element that is involved in railroad-tax cases.

283 Mr. FOULDS: The statute only authorizes the court to fix a reasonable fee for the services, and the services are only such as the court can say have been necessary in these cases. It cannot go into any such problematical services.

Mr. LANGHORNE: The theory of settling counsel fees in any case is necessarily contingent, unless the counsel announce that they are not going to appeal, but are going to pay the judgment, and the court must proceed upon the theory that the defendant will resort to all legal expedients to avoid settling the matter.

By the WITNESS:

A. I understand that there is really no paymaster—no employer; it is purely contingent on a successful result against the railroad corporation.

Defendant's counsel here moved the court for a nonsuit, upon the ground that the plaintiff had wholly failed to make out any cause of action by the evidence introduced upon its behalf. The record evidence, which had been introduced, being based upon proceedings under statutes which the supreme court of this State has declared to be unconstitutional and void, is insufficient to support any judgment in favor of the plaintiff.

The motion was overruled by the court, to which ruling defendant then and there duly excepted.

C. M. COGLAN was called and sworn as a witness on behalf of the defendant, and testified as follows:

284 I am the clerk of the State board of equalization and have in my custody the records of that board. The volume here produced, marked on the back "Record 67," is the minutes of the State board of equalization, and is produced by me from the office of the State board of equalization.

Counsel for defendant then read in evidence from page 27 of the volume identified by the witness as the minutes of the proceedings of the State board of equalization the following matter therein contained under date of Friday, August 17th, 1888:

"The board met; present, C. E. Wilcoxen, L. C. Morehouse, G. E. Sloss, John T. Gaffy, J. P. Dunn.

"On motion, all railroad companies having appeared, or notified the board that they would not appear, the board proceeded to assess the railroads of the State operated in more than one county.

* * * * * * *

"The board invited the attorney general to be present to consult with the board in reference to the assessment of the railways, so as to have the same conform to the decision of the United States Supreme Court lately rendered in the railroad-tax cases. He recommended that the franchise of the Central Pacific and Southern Pacific Companies, derived from the State, be assessed, and that the valuation thereof be stated separately in the record of assessments; that the board assess the moles, bridges and culverts of each road separately,

285 and, in respect to certain railroad companies, to declare that the steamers used in operating the roads were not assessed—that is to say, that the assessment before made be divided, so as to show the values placed upon the State franchise of the Central Pacific and Southern Pacific Companies, and upon the moles, bridges and culverts of each road assessed. Whereupon, the board proceeded to make such assessment, and it was ordered as follows: That the franchise of the Central Pacific Company, derived from the State of California, be assessed at $1,250,000; that the franchise of the Southern Pacific Railroad Company, derived from the State of California be assessed at $1,000,000; that the moles, culverts, bridges and wharves,

upon which the tracks of the Central Pacific are laid, be assessed at $1,000,000; that the moles, culverts, bridges and wharves, upon which the tracks of the Southern Pacific are laid, be assessed at $400,000."

The witness produces and identifies the original record of the assessment of the Southern Pacific Railroad Company made by the State board of equalization, for the year 1888, which was offered in evidence on the part of defendant. Said record was to the effect that the State board of equalization, being in session on this 17th day of August, 1888, all members being present, and having in consideration the question of the franchise derived from the State of California, the roadway, road-bed and rolling stock of the Southern
286 Pacific Railroad Company within the State, for the year 1888, assessed the franchise derived from the State of California, the roadway, road-bed and rolling stock of said company within said State, at the total sum of $14,000,000.

The witness then produced and identified a volume as containing the minutes of the State board of equalization of 1887, from which it appeared that the only portion of said record relating to any assessment of the property of defendant, made for that year, was as shown by the minutes of the proceedings of the 13th day of August, 1887, which were read in evidence and are as follows:

SATURDAY, *August 13th*, 1887.

Board met. All the members present.

As the week had been spent in examining railroad values, and various preliminary motions had been made, the understanding being that they should be recorded as having been made on this day—the following is a record of such motions:

Southern Pacific.—Mr. Dunn moved that the Southern Pacific Railroad Company be assessed at $20,000,000—no second. Mr. Sloss moved that it be assessed at $15,000,000—seconded by Mr. Morehouse. Mr. Dunn moved to insert $19,000,000—not seconded. Mr. Dunn then moved to insert $18,000,000—seconded by Mr. Wilcoxen; which amendment was lost by the following vote:
287 Ayes—Dunn, Wilcoxen. Noes—Gaffey, Sloss and Morehouse. Mr. Dunn then moved to amend by inserting $17,000,000—seconded by Mr. Wilcoxen: which motion was lost by the following vote: Ayes—Dunn, Wilcoxen. Noes—Gaffey, Morehouse and Sloss. Mr. Gaffey moved to insert $16,500,000—seconded by Mr. Dunn. The amendment was adopted by the following vote: Ayes—Dunn, Gaffey, Wilcoxen. Noes—Morehouse, Sloss. The motion of Mr. Sloss amended was then carried as follows: Ayes—Dunn, Gaffey, Wilcoxen. Noes—Morehouse, Sloss.

Southern Pacific.—Mr. Morehouse moved that the Southern Pacific assessment be reduced to $16,000,000—seconded by Mr. Sloss—lost. Ayes—Morehouse, Sloss. Noes—Dunn, Gaffey, Wilcoxen.

Cross-examination:

On cross-examination, at the request of counsel for plaintiff, witness identified a paper, "Plaintiff's Exhibit 5," as being in the pos-

session of the State board of equalization and among its records when he became secretary of said board, and that the same had been in his possession as such secretary ever since, until produced here in court.

Said paper was then offered in evidence on behalf of plaintiff by the attorney general, who stated that the offer was made to
288 show that the State board made the change in the assessment of 1888 at the request of the defendant itself, and in accordance with its statement, and that said document was also offered in evidence for all other purposes for which it might be pertinent in the case.

Defendant objected to the introduction of the document as incompetent, irrelevant and immaterial for the purpose mentioned.

The objection was overruled, to which ruling defendant then and there duly excepted.

The said paper was as follows:

Original.

I.

To the State board of equalization, Sacramento city:

The Southern Pacific Railroad Company answers the questions propounded by the board as follows, and makes the following statement in relation to its property subject to taxation in the State of California, owned by it for the year ending on the first Monday in March, 1888, and of all property used in operating its railway during such year.

The length of railway owned and operated as a system in and out of the State is 1,022.33 miles.

Length of track, sidings and double track reduced to single
289 track is —; out of the State, — miles; in the State — miles.

The value of the franchise derived from the State within the State is	$25 00
The value of the entire roadway, road-bed, rolling stock and rails within the State is	$9,200,970 00
	$9,200,995 00

The entire length of railway of said company in California is 1,022.33 miles, operated in the following counties, with length in each county:

County.	Miles.
San Francisco	7.36
San Mateo	25.10
Santa Clara	59.30
Santa Cruz	2.15
San Benito	17.65
Monterey	109.14

San Luis Obispo	5.45
Fresno	17.43
Tulare	62.48
Kern	153.47
Los Angeles	142.48
San Bernardino	261.47
San Diego	158.85
	1,022.33

290 (2.)

Rolling Stock.

The following is a statement respecting rolling stock, as required by section 3664, Political Code, for the year ending first Monday in March, 188–, and value of same:

Kind.	Number of each kind of rolling stock used in operating the entire road in and out of the State.	Number, kind, and value of rolling stock owned and operated upon the road in this State. Value.
Locomotives (including tenders)	92	$552,000
Sleepers, cars, ⅓ to palace cars	24	96,000
Passenger cars	103	309,000
Emigrant and smoking cars	19	28,500
Baggage, express and mail cars	28	28,000
Cabooses	34	14,400
Box freight	2,659	1,063,600
Flat freight	437	131,100
Dump, hand, section } All other kinds of cars }	316	15,800
Totals	3,712	$2,238,400

(3.)

NOTE.—Please give a description of the road as concisely as possible, but sufficient to identify it, giving the points of entrance into and exit from each county, and in such form as to facilitate the description of the road when apportioned to each county.

E. W. MASLIN, *Clerk.*

291 The following is a description of the entire length of the railway of said company in this State, and its right of way for the same.

The description of the railroad of said railroad company has heretofore been given in detail, and is now on file in the archives of the State board of equalization, to which reference is hereby made.

(4.)

CLASS A.

Statement of the Earnings and Expenses of the Road as a System in the State for Year Ending December 31st, 188–.

Earnings.		Expenses.	
Passenger	$2,167,455 02	Operating	$4,055,845 54
Freight	3,529,791 67	Rental of other roads	70,200 00
Mail and express	165,534 12	Betterments	320,767 88
Miscellaneous	123,437 37	Taxes	53,427 89
	$5,977,218 18		$4,550,241 31

Net earnings under lease, $121,815.95. $1,426,976.87.

292 CLASS A.

Statement of the Earnings and Expenses of the Road as a System in and out of the State for Year Ending December 31st, 1887.

Earnings.		Expenses.	
Passenger	$ See below in amount of $121,815.95.	Operating	$
Freight		Rentals to other roads	
Mail and express		Taxes	
Miscellaneous		Miscellaneous	

Net earnings under lease, $121,815.95.

Other Receipts.

Interest and dividends	Included in the above sum of $121,815.95 in its settlement with S. P. Co.	$
Rentals		
Net earnings of steamers		
Total revenue		

Payments.

Interest	$
General expenses	7,590 76
U. S. sinking fund	
Legal expense	1,420 35
Company's sinking fund	100,000 00
Bonds redeemed	
Land expenses	74,717 57
Taxes on land	3,991 23
Dividends	
Total	$187,719 91
Overplus or deficiency	$

Including net earnings of Southern Pacific Branch railway.

293 (5.)

Class B.

The following is the classification of subjects which are included in the term "operating expenses":

Superintendent's expenses	$
Station expenses	
Train expenses	
Water expenses	
Steamer expenses	
Office expenses	
Legal expenses	
Repairs to tracks	
Repairs to engines	
Repairs to building wharves and bridges	
Damages	
Salaries of officers	
State other expenses	
	In amount of $121,815.95 on page 4.

Class D.

State names of roads leased and the amount of annual rental paid, to include leased lines operated in only one county.

	$

294 (6.)

Class C.

Companies operating roads in and out of the State will please state the amount of earnings and expenses of the road in this State. Earnings and expenses being those of the main road with its leased line considered as a system for year ending December 31, 1887.

Earnings.		Expenses.	
Passenger and freight.....	$ Same as class A.	Operating.....	$
Mail and express.....		Rental.....	
Miscellaneous.....		Taxes.....	
Totals.....		Miscellaneous.....	

Class D.

State names of roads leased and the amount of annual rental paid, to include leased lines operated in only one county:

.....	.....
.....	
.....	
.....	.....

(7.)

State the assessed value for the preceding year, assessed by the assessor, of all property owned by the company, or held by
295 trustees for the company, and classify the same as land by acre, stations, depots, steamers, city lots, etc.

No change from previous year....	$
....	
.....	
... .	

Names of Steamers and Value.

....	$
....	
....	
.....	
....	
....	

(8.)

The following is a description of all other property of every kind owned by said company located in the State, with the value thereof.

But little change from previous years, and heretofore given.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

I, J. L. Willcutt, being duly sworn, depose and say that I am the secretary of the Southern Pacific Railroad Company, the principal place of business of said company being in the city and county of San Francisco, and that the foregoing statement and answers to questions therein contained are in all respects correct and true.

J. L. WILLCUTT.

296 Subscribed and signed before me, this the 20th day of July, 1888.

E. B. RYAN,
[SEAL.] *Notary Public.*

The foregoing pages of said statement and affidavit of J. L. Willcutt were all attached together forming one document, Exhibit 5. It was admitted by defendant that said J. L. Willcutt, making and signing the affidavit to said statement, was the then secretary of defendant, and that his signature to said affidavit was genuine.

The witness also identified a document being defendant's verified statement to the State board of equalization for the fiscal year 1887, which document the witness testified was produced by him from the records of said board in his possession. Said document was marked Plaintiff's Exhibit 7, and was introduced and read in evidence by plaintiff as follows:

(1.)

To the State board of equalization, Sacramento city:

The Southern Pacific Railroad Company answers the questions propounded by the board as follows, and makes the following statement in relation to its property subject to taxation in the State of California, owned by it for the year ending on the first Monday in March, 1887, and of all property used in operating its railway during such year.

297 The length of railway owned and operated as a system in and out of the State is 1,022.33 miles.

Length of track, sidings and double track none reduced to single track is ——; out of the State, —— miles; in the State, —— miles. See note on C. P. statement.

The value of the franchise and entire roadway, road-bed and rails within this State is $8,992,592.00.

The entire length of railway of said company in California is

1,022.33 miles, operated in the following counties, with length in each county:

County.	Miles.
San Francisco	7.36
San Mateo	25.10
Santa Clara	59.30
Santa Cruz	2.15
San Benito	17.65
Monterey	109.14
San Luis Obispo	5.45
Northern division	226.15
Northern division	226.15
Southern division	553.67
Colorado division	242.51
	1,022.33
Pajaro and Santa Cruz R. R.	26.16
San Jose and Almaden R. R.	7.80
Southern Pacific Branch R'y	47.25
Total miles	1,103.54
298 Am't for'd	226.15
Southern division:	
Fresno	17.43
Tulare	62.48
Kern	117.83
Los Angeles	142.48
San Bernardino	54.60
San Diego	158.85
	553.67 553.67
Kern	35.64
San Bernardino	206.87
	242.51 242.51
Total	1,022.33

(2.)

Rolling Stock.

The following is a statement respecting rolling stock, as required by section 3664, Political Code, for the year ending first Monday in March, 1887, and value of same:

[3]

895 NOTE.—Please give a description of the road as concisely as possible, but sufficient to identify it, giving the points of entrance into and exit from each county, and in such form as to facilitate the description of the road when apportioned to each county.

E. W. MASLIN, Clerk.

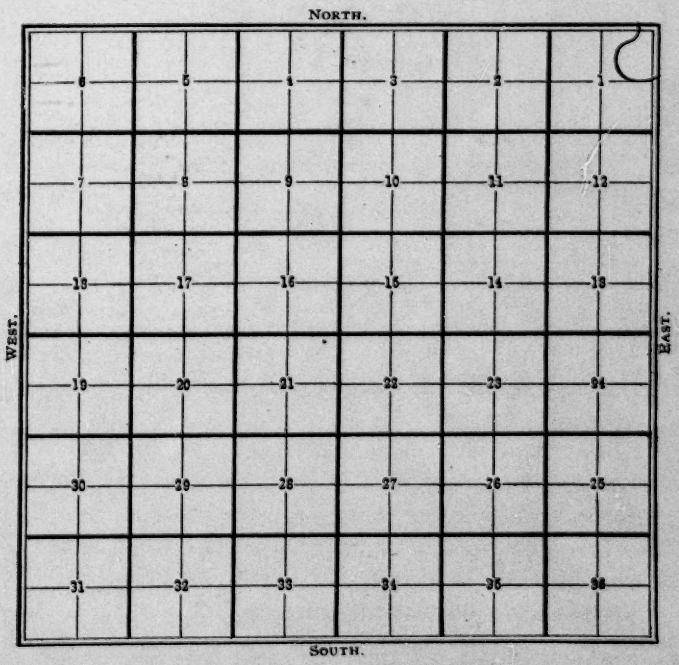
S. P. R. R.

Township No. 25 S. Range No..... R. 11 E.

.....Meridian.

Monterey County.

896 San Luis Obispo County.



897

1,022.33 miles, operated in the following counties, with length in each county:

County.		Miles.
San Francisco		7.36
San Mateo		25.10
Santa Clara		59.30
Santa Cruz		2.15
San Benito		17.65
Monterey		109.14
San Luis Obispo		5.45
Northern division		226.15
Northern division		226.15
Southern division		553.67
Colorado division		242.51
		1,022.33
Pajaro and Santa Cruz R. R.		26.16
San Jose and Almaden R. R.		7.80
Southern Pacific Branch R'y		47.25
Total miles		1,103.54
298 Am't for'd		226.15
Southern division:		
Fresno	17.43	
Tulare	62.48	
Kern	117.83	
Los Angeles	142.48	
San Bernardino	54.60	
San Diego	158.85	
	553.67	553.67
Kern	35.64	
San Bernardino	206.87	
	242.51	242.51
Total		1,022.33

(2.)

Rolling Stock.

The following is a statement respecting rolling stock, as required by section 3664, Political Code, for the year ending first Monday in March, 1887, and value of same:

DISCREPANCY IN PAGINATION

Or

PAGES MISSING

And

CANNOT BE FOUND

[-3]

895 NOTE.—**Please** give a description of the road as concisely as possible, but sufficient to identify it, giving the points of entrance into and exit from each county, and in such form as to facilitate the description of the road when apportioned to each county.

E. W. MASLIN, Clerk.

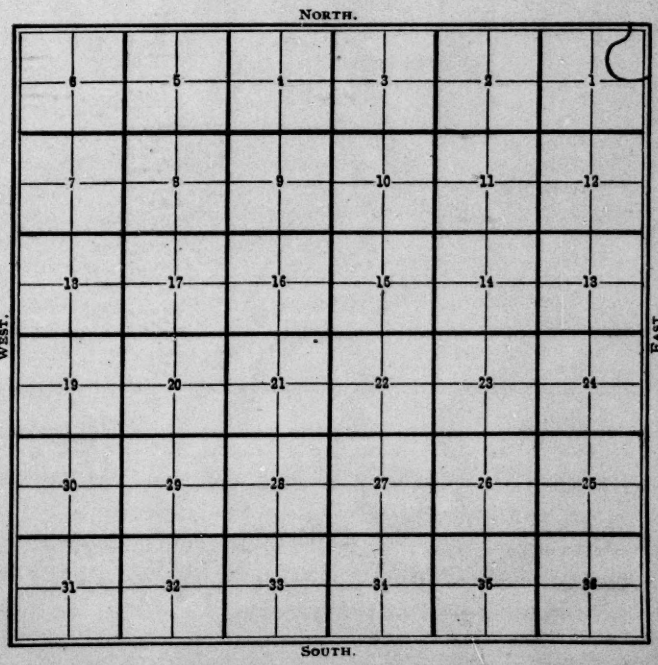
S. P. R. R.

Township No. 25 S. Range No..... R. 11 E.

.....Meridian.

Monterey County.

896 San Luis Obispo County.



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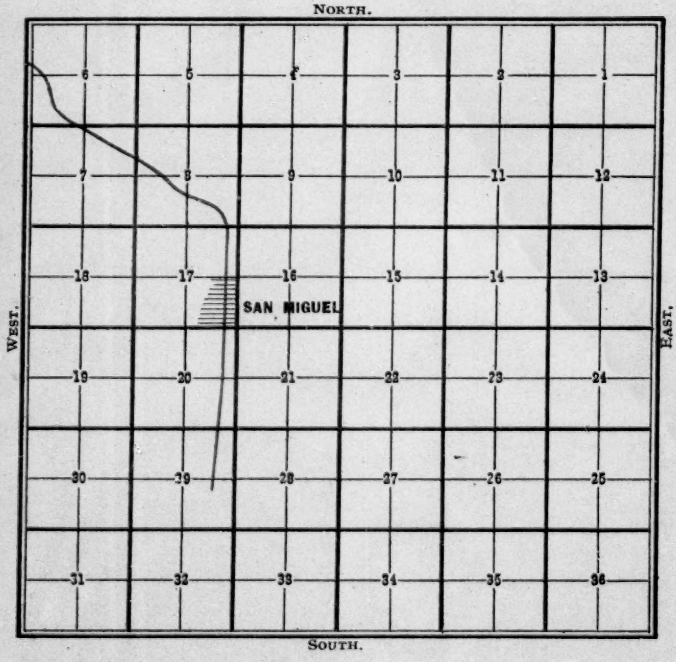
S. P. R. R.

Township No. 25 S. Range No. 12 E.

M. D. Meridian.

San Luis Obispo County.



899

900

The following is a description of the entire length of the railway of said company in this State, and its right of way for the same.

For description of railroad constructed since first Monday of March, A. D. 1886, see maps herewith made a part of this return.

Kind.	Number, kind and value of rolling stock owned and operated upon the road in this State.	
	Number.	Value.
Locomotives (including tenders)	82	$492,000
Sleepers, cars	1	4,000
Passenger cars	94	235,000
Emigrant and smoking cars	13	19,500
Baggage, express and mail cars	22	22,000
Cabooses	19	15,200
Box freight	1,256	502,400
Flat freight	408	122,400
Dump, hand, section All other kinds of cars	297	14,850
Totals	2,192	$1,427,350

(See plats marked pp. 299 and 300.)

301 Right of way (average) 100 feet wide .....

(4.)

Class A.

Statement of the earnings and expenses of the road as a system in the State for year ending December 31st, 188–, including S. P. Branch R'y, 14.80 miles; San Jose and Almaden R. R., 7.80 miles; Monterey R. R., 15.12 miles; Parajo & Santa Cruz R. R., 26.20 miles.

Earnings.		Expenses.	
Passenger	$1,587,955 58	Operating	$3,064,016 93
Freight	3,114,045 66	Rentals of other roads	94,907 08
Mail and express	140,330 04	Taxes	142,115 28
Miscellaneous	101,625 04	Betterm-nts and rep.	191,848 26
		Miscellaneous	12,822 19
	$4,943,956 32		$3,505,709 74

Net, $1,438,246.58.

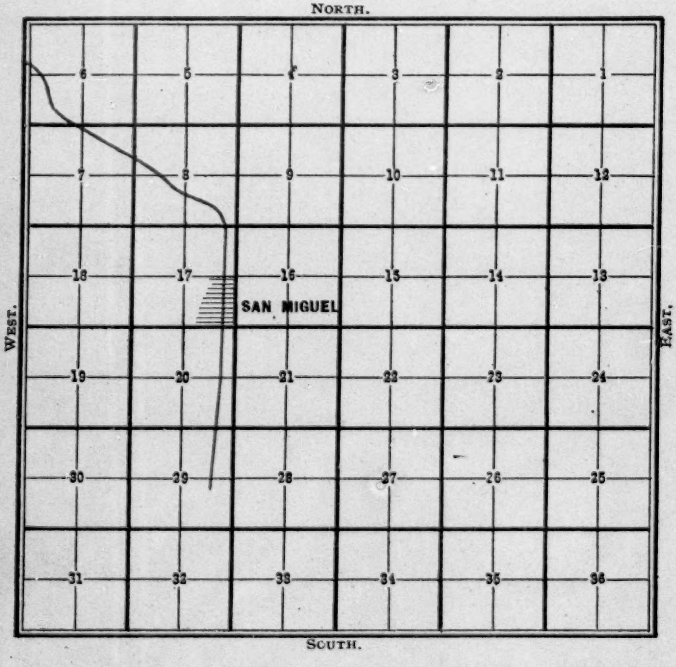
898

S. P. R. R.

Township No. 25 S. Range No. 12 E.

M. D. Meridian.

San Luis Obispo County.



899

900

The following is a description of the entire length of the railway of said company in this State, and its right of way for the same.

For description of railroad constructed since first Monday of March, A. D. 1886, see maps herewith made a part of this return.

Kind.	Number, kind and value of rolling stock owned and operated upon the road in this State.	
	Number.	Value.
Locomotives (including tenders)	82	$492,000
Sleepers, cars	1	4,000
Passenger cars	94	235,000
Emigrant and smoking cars	13	19,500
Baggage, express and mail cars	22	22,000
Cabooses	19	15,200
Box freight	1,256	502,400
Flat freight	408	122,400
Dump, hand, section All other kinds of cars	297	14,850
Totals	2,192	$1,427,350

(See plats marked pp. 299 and 300.)

301 Right of way (average) 100 feet wide .....

(4.)

Class A.

Statement of the earnings and expenses of the road as a system in the State for year ending December 31st, 188–, including S. P. Branch R'y, 14.80 miles; San Jose and Almaden R. R., 7.80 miles; Monterey R. R., 15.12 miles; Parajo & Santa Cruz R. R., 26.20 miles.

Earnings.		Expenses.	
Passenger	$1,587,955 58	Operating	$3,064,016 93
Freight	3,114,045 66	Rentals of other roads	94,907 08
Mail and express	140,330 04	Taxes	142,115 28
Miscellaneous	101,625 04	Betterm-nts and rep.	191,848 26
		Miscellaneous	12,822 19
	$4,943,956 32		$3,505,709 74

Net, $1,438,246.58.

302 *Other Receipts.*

Interest and dividends	$757 15
Rentals where road, or part thereof, is leased to another company	505,266 00
Land receipts to reduce land bonds	817,000 00
Net earnings of steamers	
Total revenue	$2,761,269 73

Payments.

Interest	$1,969,118 50
Company's sinking fund	100,000 00
Land bonds redeemed	817,000 00
Dividends	
Land expenses	44,730 25
Total	$2,930,848 75
Deficiency	$169,579 02

303 (5.)

Class B.

The following is the classification of subjects which are included in the term "operating expenses:"

Superintendent's expenses	$28,427 16
Station expenses	236,396 64
Train expenses	270,637 43
Water expenses	27,019 19
Steamer expenses	
Office expenses	83,111 35
Legal expenses	51,148 40
Repairs to track	569,659 05
Repairs to engines	147,838 62
Repairs to buildings and bridges	85,572 75
Damages, person and property	14,510 27
Salaries of officers, etc.	143,662 69
State other expenses, engineering	2,701 05
Telegraph service	31,603 58
Sleeping-car service	769 73
Wharf service	4,704 56
Locomotive service	1,002,945 92
Snow service	17 55
Repairs of machinery and tools	21,432 98
Repairs of cars	180,477 70
Stationery and printing	11,473 39
Advertising	15,407 35
Loss and damage to freight	5,920 55
Miscellaneous expenses	30,415 96
Insurance and loss by fire	6,168 64
Mileage	91,994 42
Total	$3,064,016 93

304 (6.)

Class C.

Companies operating roads in and out of the State will please state amount of earnings and expenses of the road in this State. Earnings and expenses being those of the main road with its leased line considered as a system for year ending December 31, 1886.

Earnings.		Expenses.	
	$		$
Passenger and freight.....	Same as class A.	Operating	Same as class A.
Mail and express.....		Rental.....	
Miscellaneous.....		Taxes.	
Totals		Miscellaneous.....	

Class D.

State names of roads leased and the amount of annual rental paid, to include leased lines operated in only one county.

Monterey railroad	$20,400 00
Pajaro and Santa Cruz railroad.....	31,800 00
Wilmington extension	30,707 08
Colorado River bridge....	12,000 00
San Jose and Almaden railroad (nothing)...	
Southern Pacific Branch railway (").....	

(7.)

State the assessed value for the preceding year, assessed by the assessor, of all property owned by the company, or held by
305 trustees for the company, and classify the same as land by acre, stations, depots, steamers, city lots, etc.

322,250 acres of land.....	$721,096	....
Station grounds—stations, depots, etc.....	915,463	....
....	.....	....
....	.....	....
.. ..	.....	....
....	.....	....
....	.....	....
....	.....	....
....	.....	....
....	... .	....

Names of Steamers and Value.

None	$.....	....
.....	.....	....
.....	.....	....
.....	.....	....
.....	.....	....
.....	.....	....

(8.)

The following is a description of all other property of every kind owned by said company located in the State, with the value thereof:

.....	$.....	....
.....	.....	....
.....	.....	....
.....	.....	....
.....	.....	....
.....	.....	....

306 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

I, J. L. Willcutt, being duly sworn, depose and say that I am the secretary of the Southern Pacific Railroad Company, the principal place of business of said company being in the city and county of San Francisco, and that the foregoing statement and answers to questions herein contained are in all respects correct and true.

J. L. WILLCUTT.

Subscribed and signed before me, this the 29th day of April, 1887.

[SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, Cal.

Counsel for plaintiff stated in reference to said Exhibit 7 that the same covered the assessment for the year 1887, and that he desired to call special attention to the fact that the valuation of the franchise and entire roadway, road-bed and rails within the State is specified, and that the assessment for that year follows that description precisely as inserted on the statement of the railroad company, and that it (said Exhibit 7) was offered for that and all other purposes.

Defendant's counsel objected to the introduction of Exhibit 7 for the purpose specified, on the ground that the same was incompetent, irrelevant and immaterial for such purpose.

307 The objection was overruled, to which ruling defendant then and there duly excepted. It was admitted by defendant that said J. L. Willcutt, making and signing the affidavit to said Exhibit 7 was the then secretary of defendant, and that his signature to the affidavit to said exhibit was genuine.

L. C. MOREHOUSE, called and sworn as a witness on behalf of defendant, testified as follows:

By Mr. FOULDS:

Q. What is your residence and official position, if any, Mr. Morehouse?

A. My residence is Alameda county. I am a member of the State board of equalization.

Q. For how long have you been a member of the State board of equalization?

A. Since January, 1883, I think.

Q. Continuously?

A. Yes, sir.

Q. Mr. Morehouse, do you remember the act of assessment by the State board of equalization of the property of the Southern Pacific Railroad Company for the year 1887?

A. I do.

Q. Will you look at Plaintiff's Exhibit 1 and state, if you can, what elements, or what was taken into consideration by the State board of equalization in arriving at the sum of sixteen million five hundred thousand dollars as being the value of the franchise, roadway, road-bed, rails and rolling stock of the Southern Pacific Railroad Company for the year 1887, as shown in this assessment?

(At the suggestion of the court, the witness was temporarily withdrawn and documentary and oral evidence introduced, on
308 behalf of the defendant, tending to establish the allegations of the affirmative portions of the answer as to ownership of franchises derived from the Government of the United States by the defendant, and the incorporation and consolidations of the various companies constituting the defendant, and as to the mortgage upon the road of defendant as established by the findings of fact herein.)

The witness was then recalled, and answered the next preceding question as follows:

A. Everything that was included in the law. We covered the franchise and followed the language of the law, as I understood it, all the way through.

Attorney General HART:

Q. The language of the statute law?

A. Of the constitution—the franchise, the road-bed, the right of way—everything included in the language of the law.

By Mr. FOULDS:

Q. What was included in the description of the property designated by the word "franchise" in that assessment?

A. Those matters were thoroughly discussed before our board from time to time and at different places—the bearing that the Federal franchise had upon the value of the road was discussed in our

meetings, and it was understood that we were assessing all of the things that are mentioned in the constitution.

309 Q. Well, the constitution simply uses the word "franchise." What I want to know is what you assessed when you stated in the assessment that you had assessed the franchise of the defendant?

A. Belonging to the State of California, the franchise of the State; that is, the franchises belonging to the property situated in the State of California.

Q. Did you include all of the franchise?

A. We did.

Q. Now, Mr. Morehouse, what property of the Southern Pacific Railroad Company was included or considered by the State board of equalization in its assessment of the franchise, roadway, roadbed, rails and rolling stock of the Southern Pacific Railroad Company for the year 1887?

A. You mean the elements of value. I suppose that is what you want me to answer. It was all the franchise. The Government franchise was discussed at length; the Federal franchise was discussed at length in our board. On the part of the railroad they objected and stated that it was not worth ten dollars, and could not be assessed, and it was discussed, and I think we had a consultation with the secretary of our board. It was claimed that we were liable to make a mistake by including a value upon the Government franchise.

Q. What do you mean by the Government franchise? Do you mean the franchise derived from the Government of the United States?

310 A. Yes, sir; and it was a question in our mind. I objected to it personally, and so did some of the members, and I think, in 1883, the reason that we assessed it together was that we were instructed by the attorney general of the State, and associate counsel, in a letter—I think Mr. Delmas, Terry and others—to assess it as a whole—to group it. Our secretary pointed out to several of us, and I know we discussed it often—the trouble we were liable to get in, in assessing them as a whole, and we did include all those things.

Q. When you say "all of those things," what do you mean?

A. I mean all the franchises derived from the General Government, as well as from the State, and it was well understood and talked over. The secretary having been on the board previous to my coming into the board, and in fact, all of the members—we were all new at that time, who went in, in 1883—we referred to him often in regard to those matters, and up until 1888, and then we purposely left it out.

Q. In 1888?

A. Yes, sir; intentionally omitted it.

Q. Now, in making the valuation of $16,500,000, as shown by the assessment of 1887, was there or was there not any deduction from the actual value of the property of the Southern Pacific Railroad

Company made on account of any mortgage debt that was then outstanding upon its property?

A. No deduction.

Q. You were also a member of the State board of equalization, if I remember correctly, for the succeeding year 1888, were you not?

311 A. Yes, sir.

Q. And participated in the assessment of the property of the Southern Pacific Railroad Company for that year?

A. I have never been absent, I believe, from any meeting in ten years.

Q. By the record of assessment, which has been introduced in evidence, for the year 1888, by the State board of equalization, of the property of the Southern Pacific Railroad Company, it appears that the property for that year, 1888, was assessed at the sum of $14,000,000. Can you state to the court what element was included by the State board of equalization in making the assessment for 1887 of the same property at the sum of $16,500,000, which was excluded in making the assessment of the same property in the year 1888, at $14,000,000?

A. It was not the same property exactly. We excluded something and, consequently, it was not the same property. We excluded the Federal franchise.

Q. It was not the same property?

A. Well, there was some property that was included one year that was excluded another; that is, an element of value.

Q. Well, just state what that was.

A. The Federal franchise. In answering that question, I would like, if I am allowed, to say this, that that matter might apply to me and not to other members of the board; that is, in arriving at those values, those things would not always be a positive thing as regards each member of the board.

312 Attorney General HART:

Q. Well, what you mean is, then, what operated on your mind, and you do not know whether it operated on the minds of others, or not?

A. Well, not quite as broad as that, General.

Q. Well, place your own limitations on that.

A. Well, I could explain that. It made an influence on my mind, and we omitted the franchise.

By Mr. FOULDS:

Q. Now, Mr. Morehouse, can you state if the board, as a board, considered the franchises or rights which had been derived by the Southern Pacific Railroad Company from the Government of the United States, as an element of value in making the assessment of 1888?

A. No, sir; because we had the evidence before us. The suit had been decided, and the matter was thoroughly discussed, and we excluded it intentionally, as the record will show, if you will take the

record of 1888—not the record of apportionment, but the assessment will show that.

Q. What decision of the Supreme Court do you refer to, Mr. Morehouse?

A. I could not give you the title of the case, but I know that it was discussed there.

Q. You would recognize it if you saw it, I suppose, Mr. Morehouse?

A. Yes, sir. It was a case wherein the Federal franchise came up, because I know that we anticipated it.

313 The witness identified the decision referred to by him as a decision of the Supreme Court of the United States, filed at the October term of 1887, reported in volume 127 of the U. S. Reports, at page 1. The case is entitled California *vs.* Central Pacific Railroad Company, etc.

Q. What did the board do, in the year 1887, in making its assessment of the Southern Pacific Railroad Company's property, in regard to the Federal franchise held by that company?

A. We assessed them as usual. We assessed the franchise belonging to the railroad company—belonging to that portion of the road in this State. It might have been one or fifty—it was their franchise—their right. That is my understanding of it. We talked it over often.

Q. You talked it over in the board?

A. Yes, sir, and we purposely omitted it thereafter.

Q. Well, did you, or did you not, consider the value of the Federal franchise of the Southern Pacific Railroad Company in arriving at the value of its properties?

A. I did.

Q. Now, what was it as to the rest of the board?

A. As to what value any member of the board put on when we assessed those five things as a whole—what particular value they placed upon any individual item, would be a hard matter to get at—for them to say. I would not pretend to say.

314 Q. But you are satisfied from the nature of the conversation between members of the board that they placed some value upon these Federal franchises?

A. Yes, sir; I say for myself that I did; that when it was withdrawn it had taken a large portion of the value.

Mr. FOULDS—(addressing the court): Now, we offer to prove, by this witness, that at every session, during every year of the existence of the State board of equalization, from the year 1883, and prior to the year 1888, the State board of equalization, in making its assessment of the valuation of the property of the Southern Pacific Railroad Company, included in its total estimate of the value the Federal franchise held by that company by virtue of the acts of Congress of the United States which have been introduced in evidence, and that valuation of the Federal franchise was blended into the general assessment of that company in such a manner as to be indistinguishable from it and not capable of separation.

Objected to by counsel for plaintiff as incompetent, irrelevant and immaterial.

The objection was sustained by the court, to which ruling defendant then and there duly excepted.

Cross-examination:

On cross-examination the witness testified as follows:

By Attorney General HART:

Q. Mr. Morehouse, who were members of the State board of equalization in August, 1887?

315 A. Mr. Wilcoxen was chairman, John T. Gaffy, Gordon E. Sloss and the comptroller and myself.

Q. Mr. Dunn?

A. Yes, sir.

Q. Since that time Mr. Sloss has died, has he not?

A. Yes, sir.

Q. Have you, at this time, a present, personal, distinct recollection of the circumstances of making the assessment, on the 13th of August, 1887, against the Southern Pacific Railroad Company?

A. In the main, yes, sir; not as to the details altogether—not vividly.

Q. When you say "in the main," what do you mean by that?

A. I mean that if you should ask me generally whether I seconded a certain motion, or whether I voted for a certain motion, I should not be able to tell you, but I do know about what transpired.

Q. That is, you know that the road was assessed?

A. Yes, sir; I know that.

Q. Now, is it not a fact that you have read the minutes since that time?

A. Several times; a great many times.

Q. Now then, have you any distinct recollection of the circumstances of making the assessment, when you were present, without considering anything that is written on the minutes?

A. Have I a recollection outside of the minutes?

316 Q. Yes, sir.

A. Yes, sir.

Q. Now then, who appeared there on behalf of the railroad company?

A. E. B. Ryan for one, and some people that appeared there for the railroad that I would not remember their names at present, but there were parties——

Q. I now hand you Plaintiff's Exhibit 7, and ask you to look at it and state whether you have, at this time, any recollection as to whether or not that document was examined by you at that time, or previous to the assessment of the Southern Pacific Railroad Company for 1887?

A. Yes, sir.

Q. Do you know whether or not that document was received by the State board of equalization, as the statement of the Southern Pacific Railroad Company, for the purpose of assessment or not?

A. I know that it *is* answers to the questions propounded by our board under the law, and that it was submitted to us in writing under instructions and directions from us. We sent the statement to them with these questions to be answered.

Q. Now, you have testified, Mr. Morehouse, that you understood, or your intention was, that the franchise of the Southern Pacific Railroad Company was assessed for the year 1887?

A. Yes, sir.

Q. Now, do you know why it was that the statement
317 which was furnished—the blank statement which was furnished the State board of equalization, used the expression "franchise," as contradistinguished from the word "franchises"?

A. No, sir.

Q. Do you understand, at this time, and did you at that time, the difference between the word "franchise" and "franchises"?

A. Probably.

Q. Well, you did, didn't you?

A. Yes, sir.

Q. Then, as a matter of fact, you understood the word "franchise" in the singular, to mean one franchise, didn't you?

A. I don't know that I did.

Q. Well, did you understand it to mean several franchises?

A. I understood it to mean everything which pertained to the rights and privileges of that road—the franchise, whatever it was.

Q. Then, as a matter of fact, you did not take into consideration the distinct difference between the State franchise and the Federal franchise?

A. It is my impression that they were all grouped together—the franchises belonging to that road—let them come from what source they may.

Q. Now, is it not a fact, Mr. Morehouse, that at that time you gentlemen had not gone into the consideration of the distinction or difference between the State franchise and the Federal franchise?

A. You say, is it not a fact we had not?

Q. Yes.

318 A. No, sir; it was the contrary; we had.

Q. Then what had you, at that time, considered constituted a Federal franchise?

A. Well, if you will ask me those questions, I will have to go back into former years.

Q. Well, what you understood in 1887?

A. Well, I have to tell you why and how.

Q. Well, just state what you understood was the difference between the Federal franchise and the State franchise in 1887, at the time of making this assessment—the difference between the two, if any?

A. What do you mean by that?

Q. What I mean is as to what constituted the franchise?

A. I don't think there was any difference in the description; we did not make any difference in the description.

Q. Well, now, why was it that you did not use the expression "franchises"?

A. I could not answer that question. It is a thing I never gave a thought to, the difference between franchise and franchises; but the word "franchise," as I understood it, and as I suppose the board understood it, covers all the rights of the road within this State.

Q. Well, is it not a fact that the words franchise, roadway, road-bed and rails within the State was used because of that language, in substance, being the expression contained in the constitution of the State of California?

A. Because the franchise, and the rolling stock, and everything else was spread over other miles that were not within this State.

319 Q. Well, what I mean is that the word "franchise" and the words "entire roadway, road-bed and rails within the State," as contained in the statement, had reference to the classification of property as classified by the State constitution?

A. We were compelled to classify it that way; yes, sir.

Q. Well, I say it was classified in that way.

A. Yes, sir.

Q. Then, as a matter of fact, you intended by that statement (Plaintiff's Exhibit 7), which was furnished by you, to contain the precise description which the provisions of the State constitution provided for?

A. Intended to have it contain the language?

Q. That is what I mean.

A. Yes, sir; the language.

Q. And therefore, if, as a matter of fact, the State constitution used the singular of franchise, the State franchise and not the Federal, you meant the same in this statement, did you not?

A. No, sir; we meant that it applied—that was the understanding that we had of it—whether it was proper or not—that it applied to all franchises or rights derived from every source that were elements of value.

Q. Now what did you understand at that time, the 13th day of August, 1887,—what did you understand that the railroad company meant by the expression "the value of the franchise," contained in that statement?

A. What did I understand that the railroad company meant by that? They meant to answer that question.

320 Q. Well, what did they mean was the franchise?

A. I have not any way of knowing what they meant. I have not any way of knowing.

Q. I will ask you now, as a matter of fact, who presented that statement to the State board of equalization?

A. It was mailed to the State board originally.

Q. Well, who presented it?

A. The railroad company.

Q. Now then, did any one appear before the State board of equalization in reference to that statement and the assessment, before the assessment was made?

A. Yes, sir.

Q. Who?

A. E. B. Ryan, and sometimes others representative of that company, for the purpose of explaining that statement and their position.

Q. For the railroad company?

A. Yes, sir.

Q. And that was the capacity in which you received him and entertained him, so far as hearing his plaints before the board?

A. Yes, sir.

Q. Now, is it not a fact that, at that time, Mr. Ryan explained to you what he understood was meant by that expression, in the statement, of the word "franchise"?

A. Well, whether he did in 1887 or not, I could not say; but at a great many times we had his views upon those things, not only mostly as to the values of those things, but they always
321 claimed that the Federal franchise was not assessable, and that is why I say it was discussed often before our board, and always while they were present.

Q. Then, as a matter of fact——

A. We did not agree with him.

Q. Then, as a matter of fact, if the assessment against the franchise, roadway, road-bed and rails of this company contained the Federal franchise, then the statement to you furnished by the railroad company, including the same words, also contained the Federal franchise?

Objected to by counsel for defendant as not cross-examination and incompetent, as asking for the opinion of the witness, on the grounds that the papers speak for themselves, and the witness cannot testify as to what the railroad representatives meant by the use of the language contained in the paper.

The objection was overruled by the court, to which ruling defendant then and there duly excepted.

A. The statement contained it—yes, sir; contained it—yes, sir; contained these words; but it did not contain a valuation.

Attorney General HART:

Q. Oh, I understand that. Now, what, if anything, did Mr. Ryan say at that time to the board—and previous to that time—as to the value of the Federal franchise?

A. As I remember distinctly, they claimed that it had no value—no intrinsic value; also that it was not assessable—not taxable—that it had no real value, no taxable value.

322 Q. And did not he, as a matter of fact, at that time state to you that it was not worth more than ten dollars?

A. Well, that figure has been used in connection with some of the franchises, and possibly that, because it was the Federal franchise that they put the stress upon, that it was not assessable.

Q. That it had no value?

A. It had no value; at least no assessable value; and, consequently, when they put these figures down, as you have asked me

the question, I suppose they do not count those as having any valuation.

Q. Now, Mr. Morehouse, in making this assessment, so far as you are personally concerned, did you put any value upon the franchise separately from the balance of the assessment?

A. No, sir; there was no separate value placed upon it. It was grouped together under instructions.

Q. Then, as a matter of fact, when the board voted——

A. If I had my way, I should have put a separate value upon it.

Q. Then, as a matter of fact, when the members voted, sitting as a board, upon that assessment, then, as to the views of each member as to the classification, the value of each particular property mentioned was not settled upon at that time?

323 A. No, sir. One member may have figured the franchise at one figure and the rolling stock at another, and they may have come out to the same conclusion, having different values on different things. Those were estimates. Having instructions to group them as a whole, consequently we grouped and assessed them as a whole.

Q. Now I show you the duplicate assessment-roll of the Southern Pacific Railroad Company, and I ask you to look at it. Commencing at the second line, it reads as follows: "And having under consideration the assessment of the franchise, roadway, road-bed, rails and rolling stock." Is it not a fact that, in adopting that form, and in using that language in that assessment, you simply followed the identical language used in the State constitution?

A. It is a fact that we did follow it. I always claimed myself that each one of those items should have been valued.

Q. In using in the assessment of 1887, against the Southern Pacific Railroad Company, the language as follows: "The assessment of the franchise, roadway, road-bed, rails and rolling stock," did you not intend to use that expression for the express purpose of following the language of the State constitution?

A. That was one of the purposes; yes, sir.

Q. And that in fixing the value which you assigned to the property represented by those words, you only intended to include the property which was legally assessable under the State constitution?

Objected to by counsel for defendant as incompetent and calling for the opinion of the witness.

324 The objection was overruled by the court, to which ruling defendant then and there duly excepted.

A. I intended to assess it in accordance with law; that is it. As to whether it was legal or illegal had to be decided.

Mr. FOULDS:

Q. Now, in speaking of the Federal franchise and the value of it, I did not quite understand you. Did I understand you to say that it had no value, or that it had no value which you could assess?

A. I said that was Mr. Ryan's contention, not mine.

Q. That it had no value which could be assessed; but you did not wish to be understood as saying that it had no value whatever?

A. I did not say that was my impression, but that it was the contention of the railroad people.

Q. Well, what was the exact contention? That it had no value whatever, or that it had a value, but that you could not assess it?

A. Both; that it had no value you could get at, and also that it had no assessable value; that it was a right of the company which could not be assessed.

The COURT:

Q. That is to say that it had no value; but if it had a value, it could not be assessed?

A. Yes, sir.

Attorney General HART:

Q. Mr. Morehouse, you spoke of Mr. Ryan and some other
325 members of the railroad company appearing before the board in 1887 on behalf of the company?

A. For the year.

Mr. FOULDS:

Q. Well, now, did the testimony of the witnesses, who appeared before you on behalf of the railroad company, conflict, as to their estimate of value, with the statement which was filed by Mr. Ryan with you, and which had been introduced in evidence?

A. The answer introduced by the railroad company themselves?

Q. Was it in support of the statement of Mr. Ryan, or in contradiction?

A. Usually in support of the statements. In some particulars we might have had a different view.

Q. But generally in support of the statement?

A. Generally in support of it.

Q. Now, did you take any evidence of any kind before your board in consequence of which you fixed a higher value upon the property than the railroad company set forth in their statements?

A. I think that in every case—I don't think you will find a case where we do not put it higher than they estimated it.

Q. Well, what I am asking you is this, if you increased that value over their estimate, upon hearing evidence to establish the fact that the property was of a higher value than they estimated it to be; or, if you simply exercised your own judgment, without hearing evidence upon which to base your judgment?

326 A. Well, I did not catch the meaning of that.

Q. Well, I mean this: Here the railroad companies have put in statements by Mr. Ryan, their agent, in which the railroad properties were valued at a certain figure—we will say $9,000,000—giving the length of the road, the number of engines and cars, the estimated value of each kind, and the total valuation. In the case

of the Southern Pacific, we will say that the value was eight millions and some-odd dollars. Now, in making that estimate for the same year, you assess it at $16,500,000.

A. Yes, sir.

Q. Nearly eight millions more than the railroad company estimated it to be. Now, upon what did you base that increase of value over the estimate? Did you hear evidence, or did you use your discretion?

A. We used our judgment; but, of course, our judgment was backed up by such evidence as we could get from the railroad people, and other sources.

Q. Now, Mr. Morehouse, in making that increase of value over and above the railroad people's estimate, were you not influenced, to some extent at least, by a consideration of the value of these Federal franchises that this railroad company held?

A. I can answer that in no better way than to say what we assessed in 1888, after 1887. We did include it, as I have sworn, in 1887. In 1888, we did not include the Federal franchise.

327 We left it out. We differed with them on values on a great many things, but when we got through figuring, we arrived at a lump sum as we intended to do; but my impression was that they ought to have been valued separately.

Att'y General HART:

Q. Mr. Morehouse, you assessed the value of the road in 1887, at what figure per mile?

A. Well, the motions were made at a round sum, $16,500,000. I could not tell you the exact figure that they brought per mile.

Q. Well, now, did you assess that at the same value proportionately as other property in the State?

A. That is the supposition, sir. I would like to qualify that statement. What property do you mean? All property?

Q. Yes.

A. We might not. I don't think I was in favor of assessing it for $16,500,000. I think $16,500,000 was higher——

Q. Do you know what it cost to build that road?

A. I have talked that over and heard evidence a great deal with regard to it.

Q. Well, did you have any evidence before the board with regard to building the road?

A. Yes, sir; every mile of it, nearly.

Q. Well, what was that cost?

A. Different sums. I cannot call to mind now.

Q. And that did not include the rolling stock?

A. No, sir.

328 Q. You don't know what you valued the road at per mile in 1887?

A. No, sir; I don't remember distinctly what it was.

Q. Well, you made your value much less than what it cost to build the road, did you not?

A. I presume so; in some portions of it, and in some portions a great deal more.

Q. Well, then, as a matter of fact, your assessments on this road—you considered that it was a fair assessment?

A. I thought they were high. If you will look at the record you will find——

Q. Well, was not the whole assessment of the State high that year?

A. Some portions of it were and some were not. Some had to be raised.

Q. Well, I mean after you got through that, you would consider it low?

A. Well, I would not say that. There were five of us. What I wanted to do might not carry. Now you are asking for my opinion, and my opinion as regards those things is apt to vary a little, because I did not have it all my way.

Q. Now, how much did you allow for the State franchise in that assessment?

A. Well, that, sir, is a hard question to answer. What we allowed for the State franchise or what we allowed for the Federal franchise, and it is also a hard question to answer what we allowed for the roadway or right of way.

Q. Was there any rolling stock?

329 A. Yes, we figured that; but I could show you at any time the sheets of paper at the office. I figured them forty different ways and then came to a conclusion afterwards.

By Mr. FOULDS:

Q. Mr. Morehouse, you figured upon the income of the road—on its business—the whole extent?

A. Every conceivable way you could imagine. Mr. Dunn had a theory of his own, and Mr. Markly had another theory, and we all figured it on those different theories, and tried to arrive at some estimate.

Q. The income of the road was the income derived from all its franchises, whatever they might be?

A. Yes, sir; and Mr. Dunn's idea was that he ought to take the selling values of the stock and subtract the debts from the contingent property, and I suppose that would include the Federal franchise. That was his idea, but we did not agree with him on it.

E. W. MASLIN, called and sworn as a witness for defendant, testified:

By Mr. FOULDS:

Q. Mr. Maslin, what official connection have you now, or heretofore had, with the State board of equalization of this State?

A. I was secretary of the State board from about April, 1880, until about March, 1891.

Q. As such, you were present at the meetings of the board?

A. I was.

Q. And kept the minutes and records?
330 A. I did.
Q. Of their proceedings?
A. Yes, sir.
Q. Do you remember, Mr. Maslin, the meeting of the board at which the railroad properties of the Southern Pacific Railroad Company were assessed in the year 1887?
A. I remember the assessment and the discussion.
Q. Were you present at that meeting?
A. I was.
Q. Can you state to the court what elements of value were considered by the board in making their estimate of the total values of the properties of this company for that year?
A. I think I can, but it would be—just leave it. I think I can.

By Mr. FOULDS:

Q. How do you derive your knowledge of such elements of value?
A. From the history of the assessments of this railroad since 1880—my relation to it in respect to the assessment of the franchise and the personal property; my conversation with many members through those eight years or eleven years; the knowledge I have of how two members arrived at their conclusions, and the knowledge that I think I have of how three members arrived at their conclusions.
Q. Did you hear the evidence that was taken before the board?
A. I did.
Q. Well, now, from the various sources of knowledge which
331 you have enumerated, please state to the court what elements were taken into consideration by the State board of equalization in making the assessment of this company for the year 1887?

Objected to by counsel for plaintiff on the ground that the question is incompetent, irrelevant and immaterial; that it is incompetent, because it calls for the opinion of the witness as to the feelings and judgments of the members of the board in making a vote, or taking a vote, on the assessment, and in fixing the value; and on the further ground that the witness is not definite or certain in his answer as to his knowledge of the matter, as he thinks that he knows as to three, and he is not positive as to any of them; that the prior years and the history of the taxation cannot be considered for the purpose of disclosing what judgment the board acted upon in making the assessment of 1887, and that it does not appear how much of his own knowledge is derived from documents filed or from evidence taken, and that therefore it leaves the judgment of the witness as to the extent of his knowledge indefinite and uncertain; that the question should not be answered, on the ground that the witness was not a member of the board, and therefore any opinion or judgment that he forms or may have had in the premises cannot be exercised and was not exercised then, and cannot be testified to now for the purpose of determining upon what the State board of equalization, in levying the taxes of 1887,

for the Southern Pacific Railroad Company acted; and it is incompetent, because it would vary the record.

332 The objection was sustained by the court, to which ruling defendant then and there duly excepted.

By Mr. FOULDS:

Q. Did you hear any conversation between the members of the State board of equalization during the meeting when the assessment of this company was made for the year 1887, with reference to the elements that they proposed to and did include in the assessment?

Objected to by plaintiff's counsel on the same grounds as stated in the objection to the next preceding question, and for the reason that it will be hearsay, given by a member of the board not speaking under oath, and he may have spoken one thing and acted entirely differently; and it applies also to a subsequent year, and would even be collateral as to the taxes of 1888, and certainly would be collateral as to taxes of 1887; also it has been offered for the purpose of impeachment. The foundation has not been laid by asking the proper questions.

The objection was sustained by the court, to which ruling defendant then and there duly excepted.

By Mr. FOULDS:

Q. At the time that the assessment of 1887 was made by the State board of equalization upon the property of the Southern Pacific Railroad Company, what was said and done at the meeting of the State board of equalization on that day in your presence?

333 Counsel for plaintiff objected to the question on each ground before specified; and on the further ground that the record is the best evidence of what was done at that meeting.

The objection was sustained by the court, to which ruling defendant then and there duly excepted.

By Mr. FOULDS:

Q. Now, in view of the ruling of the court on this subject, we now offer to prove by the witness that from the time of the organization of the State board of equalization in 1880, down to and including the year 1887, that board had every year considered the value of the Federal franchise—that is the franchise derived from the United States by the acts of Congress of the Government of the United States, belonging to and owned by the Southern Pacific Railroad Company—as an element of value in assessing the total value of the property of this railroad company; and that, in 1888, in consequence of the decision of the Supreme Court of the United States upon the subject, the State board of equalization, for the first time, ceased to consider this Federal franchise as an element of value, and hence reduced their valuation by the sum of two million five hundred thousand dollars on the Southern Pacific Railroad Company's property.

The offer was disallowed by the court, to which ruling defendant then and there duly excepted.

334 Mr. FOULDS:

Q. I will ask you, Mr. Maslin, if the State board of equalization, in the year 1887, in making its assessments of the value of the property of the defendant, as shown by the record of the assessment in evidence in the action now before the court, made their assessment for the full value of the property without any reservation or deduction, or whether they deducted the mortgage debts that were then subsisting upon the particular property that they were assessing.

A. They did not deduct the mortgage.

Defendant's counsel then offered and read in evidence the whole of Plaintiff's Exhibit 2, to wit, the duplicate record of the apportionment of railway assessments by the State board of equalization, and also the minutes of said State board of equalization for the year 1887, from which it appears that no apportionment was made by the State board of equalization other than that hereinbefore appearing.

Defendant's counsel here offered in evidence certified copies of minutes of certain of the proceedings of the board of supervisors of the county of Santa Clara, under date of October 3rd, 1887, which were admitted in evidence and marked Exhibit "O," and are as follows:

DEFENDANT'S EXHIBIT "O."

On motion it is ordered that the following rate of taxation for State and county purposes for the fiscal year 1887 be, and
335 the same is, hereby levied upon each one hundred dollars of the assessed valuation of the property in said county, to wit:

For State purposes	$0.608
For road purposes on all property outside of incorporated cities and towns	.30
For school purposes	.09
Current expense fund	.06
Salary fund	.04
Redemption bond fund 1876	.009
" " " 1883	.026
" " " 1885	.015
Refunding W. P. R. R. bonds '85	.015
Refunding Lick Avenue bonds	.037
Total	$1.20

It was also, on motion, ordered that the following tax — and it is hereby levied in the following-named school districts in said county of each $100 of taxable property in each of said school districts for the payment of interest on bonds issued by the board of supervisors for certain of such districts, and for the purpose of raising

building and other funds in certain other districts, as follows, to wit:

Berryessa	$0.06
Booker	.04
Hall's Valley	.30
East San José	.18
Los Gatos	.27
Summit	.40
Pala	.02
Oak Grove	.07
Midway	.19

336 Also certified copy of minutes of certain of the proceedings of the board of supervisors of the county of Los Angeles, under date of October 3rd, 1887, which were admitted in evidence and marked "Exhibit T," and are as follows, to wit:

DEFENDANT'S EXHIBIT "T."

On motion of Supervisor Venable the following is fixed as the tax levy for the fiscal year 1887–1888, on each $100.00 of taxable property in the county of Los Angeles apportioned to the following funds State and county purposes, viz:

State levy	.608
School	.115
Hospital	.066
Current expense	.320
Road	.250
Interest and sinking, 1875	.008
" " " 1878	.013
" " " 1881	.0055
" " " 1882	.006
" " " 1884	.0115
" " " 1885	.085
" " " 1887	.012
County	1.50
City	1.25

In re railroad assessment.

Upon motion of Supervisor Ross it is hereby ordered and declared that the length of main track of railway assessed by the State board of equalization within the county, is 152.48 miles.

337 The assessed value per mile of such railway is S. P. R. Company is $16,139.00—S. P. Company is $117,622.00. S. P. B. R. Company is $7,407.40—S. P. Company $117,622.00.

The assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, school and road district within said county are as follows, viz:

Railroad district.	No. of miles.
In Los Angeles city	9
" Compton	4.40
" Elizabeth Lake	18.20
" El Monte	2.80
" Florence	3.80
" Lugo	1.00
" Newhall	19.58
" Providencia	6.05
" Palomares	3.10
" Rowland	11.50
" Soledad	18.90
" Sulphur Springs	9.90
" San Fernando	12.50
" Sepulveda	6.15
" Savanna	5.50
" San Gabriel	3.70
" San José	4.80
" San Pedro	2.60
" Vernon	1.80
" Wilmington	7.20

Also certified copy of minutes of certain of the proceedings
338 of the board of supervisors of the county of San Benito, under date of October 3rd, 1887, which were admitted in evidence and marked "Exhibit U," and are as follows, to wit:

DEFENDANT'S EXHIBIT "U."

In the matter of State and county taxes.

The State board of equalization at their office in Sacramento, having on the 17th day of September, 1887, fixed the rate of State tax levied and to be collected upon each one hundred dollars of the assessed valuation of the property of the State, to raise the specific amount of money required to be raised for the 39th fiscal year, at sixty cents and eight mills, and the said rate was fixed and apportioned as follows: For the general fund 38.5 cents. For the school fund 19.0 cents. For interest and sinking fund 2.3 cents. For University of California 1.0 cent. Total 60.8 cents. It is therefore ordered that the said rate of State taxation be levied upon the taxable property in San Benito county.

And it is further ordered that the following sums be and they are hereby levied and ordered to be collected on each $100 of the assessed valuation of taxable property in said county of San Benito for county purposes for the year 1887, to wit, ($1.04.2) one hundred and four cents and two mills. And it is ordered that the said tax rate be and the same is apportioned as follows:

339	School fund	26.0	cents.
	Interest "	4.0	"
Salary	fund	18.0	"
Road	"	20.0	"
Revolving	"	2.00	"
General	"	34.2	"
	Total	104.2	"

A school tax having been voted for in Aromas school district for the purpose of purchasing and building an addition to school-house at a cost of $350, it is hereby ordered that the rate of tax on each $100 of property valuation in said district necessary to raise the said amount be, and the same is, hereby fixed at 35 cents. And it is further ordered that the said sum of 35 cents be levied and collected upon each $100 of the assessed valuation of the taxable property in said district.

Also certified copy of certain minutes of certain of the proceedings of the board of supervisors of the county of San Bernardino, which were admitted in evidence and marked "Exhibit V," and are as follows:

DEFENDANT'S EXHIBIT "V."

Regular meeting of the board of supervisors.

MONDAY, *Oct.* 3, 1887—9 o'clock a. m.

Present: T. H. Eckles, chairman *pro tem.*, A. S. White, M. B. Garner, F. M. Slaughter, supervisors.

GEO. L. HISOM, *Clerk*,
By G. W. BEATTIE, *Deputy*.

340 In the absence of Mr. Cooley, Mr. Eckles was chosen temporary chairman.

The board having under consideration the fixing of the tax rate for this fiscal year, the ad valorem rate of taxation levied and to be collected upon each one hundred dollars of the assessed valuation of the property of this county was fixed and apportioned as follows, the rate levied for road fund being omitted from property situated within the corporate limits of the city of San Bernardino and the city of Riverside:

State	fund	60.8	cts.
County	"	25.2	"
School	"	18.	"
Hospital	"	7.	"
Road	"	20.	"
Bond int.	fund	2.	"
	Total rate for State & county purposes	133.	"

In addition to the above rate a further rate of tax was fixed upon property situated in each of the following school districts in the county as follows:

Upon each one hundred dollars of the assessed valuation of taxable property in Ontario school district a district school tax of 11 cents and a school bond and interest tax of 8 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Riverside school district a district school tax of 7 cents and a school bond and interest tax of 29 cents.

341 Upon each one hundred dollars of the assessed valuation of taxable property in Highland school district a district school tax of 11 cents and a school bond and interest tax of 16 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Arlington school district a district school tax of 5.5 cents and a school bond and interest tax of 5.5 cents.

Upon each one hundred dollars of the assessed valuation of the taxable property in Colton school district a district school tax of 12 cents and a school bond and interest tax of 13 cents.

Upon each one hundred dollars of the assessed valuation of the taxable property in Hermosa school district a school bond and interest tax of 6 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Brooke school district a school bond and interest tax of 4 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Redlands school district a school bond and interest tax of 40 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Mt. Vernon school district a school bond and interest tax of 3 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in San Antonio school district a school bond and interest tax of 7 cents.

342 Upon each one hundred dollars of the assessed valuation of taxable property in Riley school district a school bond and interest tax of 15 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Calico school district a school bond and interest tax of 25 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Lugonia school district a school bond and interest tax of 14 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Valley school district a school bond and interest tax of 23 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Cram school district a school bond and interest tax of 24 cents.

Upon each one hundred dollars of the assessed valuation of tax-

able property in San Gergonia school district a school bond and interest tax of 13 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Etuvanda school district a school bond and interest tax of 20 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Magnolia school district a school bond and interest tax of 13 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Summit school district a school bond and interest tax of 17 cents.

343 Upon each one hundred dollars of the assessable valuation of taxable property in City Creek school district a school bond and interest tax of 11 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Mission school district a school bond and interest tax of 3 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Perdew school district a school bond and interest tax of 15 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Chino school district a school bond and interest tax of 15 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Lytle school district a school bond and interest tax of 30 cents.

Upon each one hundred dollars of the assessed valuation of taxable property in Agua Mansa school district a school bond and interest tax of 46 cents.

Also certified copy of certain minutes of certain of the proceedings of the board of supervisors of the county of San Luis Obispo under date of October 3rd, 1887, which were admitted in evidence and marked "Exhibit W" and are as follows, to wit:

344 DEFENDANT'S EXHIBIT "W."

The board now proceed to make the tax levy for the year 1887 & '8 for State and county purposes, and *due* now make and levy the following percentage on every $100.00 valuation, to wit:

For State purposes.....	c.	60.8 on every $100 valuation.
" county general fund		21.2
" hospital " "		6
" interest "		9
" road "		35
" school "		24
" salary "		11
Total.....		167

The following levies were then made to raise the amounts hereinafter stated for special school purposes in the school districts herein named, to wit:

La Panza school district, am't to be raised $100.00, rate 8c. on every $100.00 valuation.

Iron Springs school district, am't to be raised $150.00, rate 45c. on every $100.00 valuation.

Branch school district, am't to be raised $1,000.00, rate 65c. on every $100.00 valuation.

Oso Flaco school district, am't to be raised $1,000.00, rate 70c. on every $100.00 valuation.

Paso Robles school district, am't to be raised $3,000.00, rate 70c. on every $100.00 valuation.

Rinconada school district, am't to be raised $950.00, rate 70c. on every $100.00 valuation.

345 Mission school district, am't to be raised $3,650, rate 22c. on every $100.00 valuation.

The board now adjourns until tomorrow at 8 o'clock a. m.

CHAS. W. DANA, *Clerk.*

——— ———, *Chairman.*

It further appeared from said Exhibits O, T, U, V, W, that the boards of supervisors of the counties referred to therein did, on the 3rd of October, 1887, each make and cause to be entered in their minute books respectively an order declaring the length of main track of defendant's railway assessed by said State board of equalization within said counties respectively, and the assessed value per mile of said railway, as fixed by the State board of equalization, and the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road district, and lesser taxing district in said counties respectively through which defendant's railway ran, using the same mileage rate of valuation and the total mileage in the entire county as fixed by the State board of equalization, in estimating and making the apportionment to each of said lesser taxing districts.

By stipulation of counsel it was agreed that the allegations found at the end of the statement of the facts of each cause of action in the amended complaint, which were added thereto as amendments during the progress of the trial, and are as follows:

346 "Before the fourth Monday of October, 1887, said controller did compute at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums in dollars and cents, rejecting fractions of a cent to be paid by the defendant as the State tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the fourth Monday in October, 1887, said controller did publish for two weeks in one daily newspaper of general circulation published at the State capital of said State, and in two daily newspapers of

general circulation published in the city and county of San Francisco, in said State, a notice that he had received from said State board of equalization, said duplicate record of assessments of railways, and said duplicate record of apportionment of railway assessments, and that the said taxes were then due and payable, and would become delinquent on the last Monday in December, 1887, at 6 o'clock p. m., and that unless paid to the State treasurer at the capital prior thereto, five per cent. would be added to the amount thereof.

"That a reasonable compensation for legal services, by Langhorne & Miller, attorneys for plaintiff, in the institution and prose-
347 cution of this cause of action, is a sum equal to ten per cent. of the tax in this cause of action alleged to be delinquent," should be taken and considered as denied by defendant as fully as though such denial were set forth in the answer in this cause.

Rebuttal.

C. E. WILCOXEN, called and sworn on behalf of plaintiff, testified as follows:

By Mr. LANGHORNE:

Q. During the years 1887 and 1888, you were a member of the State board of equalization of this State, were you?

A. Yes, sir.

Q. During those years, of what members did the board consist—yourself?

A. Yes, sir; and Mr. Morehouse and Mr. Dunn.

Q. Mr. L. C. Morehouse, Mr. John P. Dunn?

A. Yes, sir; and I don't recollect——

Q. And Mr. Sloss?

A. I think, in 1887, was it not Mr. John T. Gaffy?

Q. The board had a clerk, I understand, or secretary, Mr. Maslin?

A. Yes, sir.

Q. The proceedings of the board were kept by the secretary of the board?

A. They were.

Q. All action taken by the board with reference to the assessment of railroads, and especially with reference to the Southern Pacific
348 Railroad Company, were made matters of record either in the minutes of the board or in the assessment book of the board, were they not?

Objected to by counsel for defendant as incompetent, for the reason that it has not been shown that this witness has examined all the records of the board and all the assessments and knows what the contents of those various records are.

The objection was overruled by the court, to which ruling defendant then and there duly excepted.

A. They were.

By Mr. LANGHORNE:

Q. (Handing witness a volume endorsed "State board of equalization, June 1st, 1881.") Mr. Wilcoxen, I call your attention to pages 423, 424, 425, 426, 427, 428 and 429 of that record, under date, purporting to be proceedings of the State board of equalization of Saturday, August 13th, 1887, with reference to assessing the defendant railroad companies. Will you just look over those, please? Now, have you examined this record sufficiently; and do the minutes, signed by the secretary, E. W. Maslin, of the proceedings of the board of August 13th, 1887, truly record the acts and proceedings of the board in regard to the matters therein stated?

A. Yes. They were read and approved the following morning always.

(The pages here referred to by counsel for plaintiff and this witness were the same as are set out at length in the evidence of C. M. Coglan herein.)

349 A. (continued as to previous question). There might have been a time or two they were omitted the next morning, when there was a great deal to do; but as soon as he could write them up, they were read and approved.

Q. Now, in arriving at the valuation of these different roads, did you have before you, and before the board, the statement filed by the defendant?

A. Yes, sir.

Q. Was there any conversation between members of that board as to what appears in this?

A. Oh, conversation! Of course, there was a great deal of it.

Q. Well, how long had you been a member of the State board of equalization at the time of this meeting?

A. I guess I was elected in 1882, and I was a member——

Q. You have been present at the greater part of their meetings?

A. I never missed one in eight years.

Q. Now, in regard to any Federal franchise, Mr. Wilcoxen, of the Southern Pacific Railroad Company for the year 1887, was that assessed for that year?

A. I think not, sir—I think not.

Q. By the State board of equalization, I mean.

A. Well, that is what I mean now.

Q. Well, were there assessed by the State board of equalization, for the year 1887, any fences or any steamboats for any of the railroads?

350 A. We never assessed railroad fences or any steamboats for the whole eight years I was in there.

Q. Was there any statement or showing before the State board of equalization for the year 1887 of what was claimed to be a Federal franchise on behalf of the Southern Pacific Railroad Company?

A. I am not positive, but I think there was not. I can't remember.

Q. Did you have before you the question in regard to the value of the property of the Southern Pacific Railroad Company for the year 1887?

A. Yes, sir.

Q. The statement filed by the company?

A. We had them all there every year.

Q. (Showing the witness Plaintiff's Exhibit 7). Is that the statement of the Southern Pacific Railroad Company for the year 1887?

A. Yes, sir.

Q. Now, in that statement occurs the following: "The value of the franchise and entire roadway, road-bed, and rails within this State is $8,992,592." Did the board, in assessing the property of the Southern Pacific Railroad Company for the year 1887, include any franchise other than here designated in the report of the Southern Pacific for that year?

Objected to by counsel for defendant on the ground of incompetency, and asking for the opinion of the witness.

The COURT: Well, you have asked your own witness the reverse of the proposition.

351 Objection overruled, to which ruling defendant then and there duly excepted.

A. They did, I suppose.

Q. What did you, as a member of the board and in considering the value of the Southern Pacific railroad property for the purpose of the assessment for the year 1887, consider that the company intended by using the word "franchise" there in its statement?

Objected to by defendant as incompetent, irrelevant and immaterial.

Objection overruled, to which ruling defendant then and there duly excepted.

A. Well, I supposed they considered it of some value at least.

Q. Well, which franchise, or what franchise, did you suppose they referred to there?

A. Objected to by defendant as incompetent, irrelevant and immaterial.

Objection overruled, to which ruling defendant then and there excepted.

A. The State franchise, of course.

Cross-examination:

On cross-examination the witness testified as follows:

By Mr. FOULDS:

Q. Now, don't you know, Mr. Wilcoxen, that at all these meetings of yours, the question of franchises owned by these companies, the Central Pacific Railroad Company and the Southern Pacific

352 Railroad Company, and derived from the Federal Government, had been constant matters of conversation and discussion among the members of the board?

A. They were, up to the time that the Supreme Court decided that we had no right to assess them, and then we never had anything to do with them afterwards.

Q. But up to that time you considered them?

A. Yes, sir.

Q. Now, your memory is good, Mr. Wilcoxen?

A. It is not very good for two or three years.

Q. You recollect all the proceedings at the meeting of August 13th, 1887?

A. No, I do not recollect all of them in particular.

Q. Now, you stated here that the record produced here contained all of the proceedings?

A. Yes, sir, from the fact that it is our record, and we had it read every morning.

Q. Then you rely upon that fact and not upon your memory? You don't pretend to keep in your memory all the proceedings of the board on that day?

A. Not quite.

Q. Well, you don't pretend to do that?

A. No, sir.

Q. But you simply rely upon the fact that this is the record of the board, and that that record was read daily and approved?

A. Yes, sir; that is all I have to go by—the record.

Q. That is all you intend to say. That is what I supposed.

353 Now then, Mr. Wilcoxen, you recollect the decision? Just let me show you.

Mr. LANGHORNE: I object. You don't expect a witness who is not a lawyer——

Mr. FOULDS: I object to any interruption of my cross-examination.

The COURT: Before answering, Mr. Wilcoxen, wait. Proceed with your question.

Mr. FOULDS:

Q. Mr. Wilcoxen, you referred to the decision of the Supreme Court in reference to the Federal franchise; that was the case that was published. That was a decision that was rendered in the October term of 1887 by the Supreme Court of the United States, was it not?

Mr. LANGHORNE: Wait a minute before you answer that question. I object——

Mr. FOULDS: I object to this interruption.

Mr. LANGHORNE: It is unfair to the witness.

Mr. FOULDS: You have no right to inform the witness.

Mr. LANGHORNE: I am objecting to your question.

The COURT: Mr. Langhorne has a right to make his objection.

Mr. LANGHORNE: Now, if your honor please, there are two decisions. This matter was brought before the State board of equalization when the Supreme Court decided it, two years before that.

354 Mr. FOULDS: The gentleman is simply leading the witness by his suggestion, and I think it is highly improper that the gentleman should interrupt me and lead the witness.

Mr. LANGHORNE: Well, I don't intend that you shall take a gentleman, not a lawyer, and try to mix him up on a Supreme Court decision.

The COURT: You have finished your objection, Mr. Langhorne?

Mr. LANGHORNE: My objection is that the question asked the witness to distinguish between a circuit court decision and a Supreme Court decision.

The COURT: You can straighten that out on redirect examination. Objection overruled.

Mr. FOULDS:

Q. The decision we refer to was the decision of the Supreme Court of the United States?

A. No, sir; it was not. It was the circuit court here.

Mr. FOULDS: You see the gentleman has led the witness.

A. No, sir; excuse me, but Mr. Maslin and Mr. Markly were down here at the time.

Q. What year was that decision rendered?

Mr. LANGHORNE: In 1886.

Mr. FOULDS: Now, that is going too far.

Mr. LANGHORNE: I thought you asked me.

355 The WITNESS: I don't recollect the year.

Mr. FOULDS: I consider this interference a perfect outrage. This is monstrous. (To the witness:)

Q. But you are certain of the court by which the decision was rendered, are you?

A. I am, from the very fact, as I stated awhile ago, that Mr. Markly and Mr. Maslin were down here as witnesses before the court.

Q. Then, up to the time that that decision was rendered, you had regularly assessed the Federal franchises of these companies?

A. That is my recollection.

(The court here took a recess, and, at its afternoon session, the witness was recalled for further cross-examination and testified as follows:)

By Mr. FOULDS:

Q. What year was it that you said you became a member of the State board of equalization?

A. I guess it was 1882 or 1883; the same time General Stoneman was elected governor.

Q. The same time that Stoneman was elected governor? And, if I understood your testimony correctly this morning, you testified that you included the value of the Federal franchise in the Central Pacific and Southern Pacific Railroad Companies' valuation of assessments until the decision of the circuit court of the United States?

A. On reflection on that, I don't believe we ever did. I have been studying on that since.

356 Q. What is that?

A. I say, on reflection, I don't think we ever assessed a Federal franchise.

Q. Well, you testified this morning that you did.

A. Well, I said I thought we did.

Q. But on reflection you say you did not?

A. Well, I don't think we did. If a man makes a mistake he certainly has a right to correct it.

Q. Well, what was that decision by the circuit court to which you referred—by whom was that rendered?

A. By the judge who died here, Sawyer. I think it was him.

Q. Do you remember what year that decision was rendered in?

A. Well, I should guess it was about 1886.

Q. You think it was about 1886?

A. Yes, but I ain't positive.

Q. How long was it after you became a member of the State board of equalization? How long had you been a member at the time the decision was rendered?

A. Well, I couldn't tell the exact date.

Q. Well, what is your best recollection? One year, or two years, or three or four?

A. Well, I think, as near as I can remember, it must have been about three and a half years.

Q. Would you remember the decision if you were to see it?

A. I suppose I could, but I can't read hardly.

357 Q. Well, could you remember the title of the case if it were recalled to you?

A. Well, let me see, and I will see if I can. I have been so afflicted since Monday that I am not myself at all.

Q. Was that a decision of Judge Sawyer or Judge Field?

A. I am not positive which.

Q. You are not positive which?

A. No, sir; I rather think, though, it was Sawyer.

Q. Was the decision by Judge Field rendered in what was called the Santa Clara tax case?

A. I cannot tell you. I have not looked at it for three years.

Q. And you don't remember what were the points decided in that case as you remember them?

A. Not excepting that they stated that they had no right to assess a Federal franchise.

By Mr. FOULDS:

Q. I want to know what decision you refer to.

A. I think it was in 1886; I am not positive.

Q. I want to fix some date to it. Now, Mr. Wilcoxen, I don't want to take any advantage of your position as witness on this stand. You have had time to consider your testimony since you were here before and you have now stated that you think the Fed-

eral franchises were not assessed at all. Do I understand you correctly?

A. The Federal franchise?

Q. The Federal franchise of the railroads was never assessed at all?

358 A. I am not positive but I think they were not.

Q. Now, what has occurred since you were here this morning to change your testimony from that you gave this morning to that you give now?

A. Well, I was thinking about Mr. Maslin writing and making up a report, in which he said—and we had Mr. Delmas in the case.

Q. You testified this morning, in your direct examination, Mr. Wilcoxen, did you not, that in the year 1887, you did not assess as part of the property of the Southern Pacific Railroad and Central Pacific Railroad Companies any culverts or bridges as a part of their property?

A. Not that I know of, except that it might have been where there was a part of the road-bed.

Q. That you did not assess them at all?

A. Well, I said except it was that way.

Q. Well, in what way did you, or did you not, assess them?

A. I say we might have assessed some small bridges—what would be in the road-bed—but not bridges, we never assessed any bridges.

Q. Now, about culverts?

A. We never assessed any culverts that I know of.

Q. Did you assess them as part of the road-bed?

A. I suppose so, but I cannot remember exactly, sir.

Q. Well, I will call your attention to the minutes of the

359 board of 1888. In the minutes of the State board of equalization of August 17th, 1888, which have been introduced in evidence in this case, appears the following (I want to read it, for the witness says his eyesight is poor, and I read it for his information):

"The board invited the attorney general to be present to consult with the board in reference to the assessment of railways, so as to have the same conform to the decision of the United States Supreme Court lately rendered in the railroad-tax case. He recommended that the franchise of the Central Pacific Railroad and Southern Pacific Railroad Company derived from the State be assessed, and that the values thereof be stated separately in the record of assessment that the board assess the moles, bridges and culverts of each road separately, and in respect to certain railroad companies to declare that the steamers used in operating the same were not assessed; that is to say, that the assessment should be made divided so as to show the valuation placed upon the State franchise of the Central Pacific and the Southern Pacific Companies, and upon the moles, culverts and bridges of each road assessed."

Do you recollect that circumstance?

A. I recollect very well that Mr. Johnson was there.

Q. Now, Mr. Wilcoxen, you remember that. Now, don't you also

remember, on further reflection, that up to the time the
360 board received that advice from the attorney general—that is, up to and including the assessment for the year 1888—the board met every year during the time that you were a member of that board, and assessed the Federal franchise of the Central Pacific Railroad Company and the Southern Pacific Railroad Company, and also the bridges and culverts as a part of their railroad property?

A. I don't recollect of their assessing any bridges.

Q. Do you recollect that you included the bridges as a part of their property?

A. County assessors generally assess them.

Q. Well, now, you have not answered my entire question. (To the reporter—Read the entire question to him, as I don't want to take the witness by surprise, and I want to give him an abundant opportunity to reflect.)

The second preceding question was then read to the witness by the reporter.

A. They may have assessed the franchise. I would not swear that they did or did not.

Q. Now, what do you say about the rest?

A. I have no recollection in the world of assessing any bridges.

Q. Well, what about culverts?

A. Well, I don't recollect any of them. They may have done it. I paid no attention to it since I have been out of office.

Q. Now, don't you know, Mr. Wilcoxen, that when the assessment was made for the year 1888, the franchise of these companies, derived from the State of California, was separately assessed, and was the only franchise assessed?

361 A. I do not.

Q. Don't you remember anything about that assessment?

A. I am satisfied we assessed the franchise in them.

Q. Don't you remember that in the year 1888 the franchise of those companies, derived from the State of California, was assessed separately in the assessment?

A. I think they were assessed, but whether they were assessed separately or not, I cannot remember.

Q. And you recollect that in the assessment for that year, there were many other things?

A. Which year?

Q. 1888; that were assessed separately—that were formerly blended together in the assessment?

A. No, sir.

Q. You don't remember it?

A. No, sir.

Q. Mr. Wilcoxen, were you called and sworn as a witness before the assembly committee on judiciary of the assembly of the State of California?

A. I was.

Q. When they were considering railroad-tax suits, and other matters, on the 23rd day of February, 1889?

A. I don't recollect what date it was. I know I was summoned before them.

Q. Were you sworn, and did you testify before them?

362 A. I did. It was fresh in my memory then, too, at the time.

Q. Those things were fresh in your memory at the time?

A. Yes, sir.

Q. Your memory, then, on these matters, was better then than it is now of course?

A. Yes, sir; a good deal.

Q. Do you remember who examined you at that time, what counsel?

A. I think Mr. —— —— was one of them for the railroad.

Q. Do you remember Mr. Lezynsky?

A. Yes, sir; I recollect there was such a man there. I did not know the man.

Q. Do you recollect that Mr. Lezynsky examined you to some extent?

A. There was two of them.

Q. I will ask you if, on the 23rd day of February, 1889, at Sacramento, in the State of California, before the committee on judiciary of the assembly of the State, you were sworn and asked by Mr. Lezynsky the following questions?

Attorney General HART: Now, I object to that, that the witness should be shown the statement first, that he may examine it; and, on the further ground, that counsel has not specified the taxes that he had reference to; and, on the further ground, that it is not shown that they apply to the tax now in question before the court; further, that the testimony which the counsel proposes now to read is hearsay and incompetent. It was not given in any suit

363 between the same parties to this suit and, therefore, it is incompetent in any way, shape or manner. This is not shown to be a record of it, and the State was not a party to that proceeding.

Mr. FOULDS: I shall show that when I come to the proper place. I am now simply asking the witness if he made a statement at another time that varies from the statement he makes here now. I ask him if, on that day, in the city of Sacramento, before the assembly judiciary committee, where he has testified he was sworn as a witness, he was asked a question by counsel, which I will read, and if he made a certain answer, which I will read.

A. That testimony is correct all through—the questions and the answers.

Mr. FOULDS: I will now read, for your honor's information, the question and answer upon which I propose to interrogate the witness:

"By Mr. LEZYNSKY:

"Q. In making this assessment, when you arrived at this valuation—in making the computation, which was a computation to arrive at these assessments—was there ever any valuation placed upon any Federal franchise or the valuation of any Federal franchise included in the amounts, which were the amounts figured up as the valuation of these roads?

"A. I always understood it, until 1888, that we assessed the franchise.

"Q. I ask you as to the Federal franchise?

364 "A. I don't know. I don't recollect of that matter being before the board. Some of the balance of the members may remember it.

"Mr. DIBBLE:

"Q. Your statement is that they always did assess franchises up to this last year?

"A. Yes, sir; up to the last year.

"Mr. LEZYNSKY:

"Q. Did you assess one or more for each road?

"A. As it is, I don't think they assessed but one.

"Q. Was that understood to be the State franchise or the Federal franchise?

"A. I could not answer that question."

The COURT: Now, gentlemen, the question is submitted, and I see what I feared would be the result of introducing circumstantial evidence has resulted, to wit: that you would drag in a lot of testimony for years subsequent and years prior, that really would have no bearing upon this assessment for 1887 at all, and it is mixing up matters very much indeed. Now I do not propose to allow any more circumstantial evidence. You can introduce that evidence upon the year 1887, and be content with that; but I will not allow any evidence as to what the board did in 1886 or 1885, or any other year but the one in controversy. As to this particular witness, the result of all this testimony is practically the same, that he don't recollect. This is partially collateral, and you

365 cannot impeach a witness on collateral matters. Proceed, and confine yourself to what the board did in 1887.

Mr. FOULDS: We reserve an exception.

Q. Now, you have testified, in your examination-in-chief, that, in the year 1887, the State board of equalization did not assess the Federal franchises of the Central Pacific and Southern Pacific Railroad Companies; is that right?

A. Yes, sir; that is according to my recollection.

Q. Now, how do you know that they did not assess those franchises?

A. Because we talked the matter over among us there, together.

Q. What was that conversation?

A. Well, it was in regard to the decision of the court that we had

no right to assess it, and, of course, I cannot remember all that I was talking about.

Q. Who were the members of the board with whom you discussed that matter?

A. Mr. Morehouse, Mr. Dunn and the member that died here, Mr. Sloss, Mr. Gaffy and myself.

Q. Now, I am talking about 1887.

A. Well, I cannot recollect. If it was not those, it was Mr. Gildea, Mr. Morton, Mr. Morehouse, Mr. Dunn and myself.

Q. Do you remember anything about the assessment of 1887? I want you to be clear upon the year.

A. Oh, I could not separate it from the other without going and looking at the minutes.

366 Q. Well, you did testify this morning that in 1887 the Federal franchises were not considered by the board?

A. Yes, sir, I did.

Q. Did you testify that?

A. Yes, sir.

Q. Now then, how do you know that they were not considered by the board in that year, 1887?

A. Because I talked the matter over in regard to the decisions of the courts.

Q. Which decision did you refer to in that year?

A. Oh, all of them, if you want to know—all of them—two or three of them.

Q. Now, was there anything said by any member there to indicate that, so far as he was concerned, he was assessing only the State franchise and not the Federal franchise?

A. I think that was the expression of every member of the board, as well as I recollect.

Q. Was it the expression of Mr. Morehouse?

A. Sir?

Q. Did Morehouse express himself inthat way?

A. I think he did. Mr. Morehouse can speak for himself; he is here.

Q. Was there any determination come to by the board, in joint consultation, in your presence, determining as to whether they did or did not assess the Federal franchise of these two roads for that year, 1887?

367 A. Well, now, I would not be positive about it, whether it was 1887 or 1888.

Q. Well, I want to fix it.

A. Well, I cannot.

Q. You cannot be positive?

A. No, sir; but I know it was——

Q. Now, from the condition of your memory in this respect, Mr. Wilcoxen, is it not very probable that it was in 1888, just after the Supreme Court of the United States had rendered its decision?

A. I rather think it was in 1887; but, as I said before, I would not be positive.

Q. You are not positive?

A. No; I am not positive.

Q. It might have been in 1888?

A. Let me see the minutes and I can tell.

Q. Well, I am referring to your memory now.

A. Well, I don't put my memory up against the minutes of the board of equalization.

Q. Then you cannot state from memory but what this conversation might have been in the year 1888, when you were making the assessment?

A. Now, it might have been; but I don't think it was. That is just as plain as I can answer.

Q. But you know that you discussed a recent decision of the courts of the United States and on that decision you acted?

A. Yes, sir.

Q. Whatever year that might have been?

368 A. Yes, sir.

Q. Now, Mr. Wilcoxen, do you remember this, that in the deliberations of the board for 1887, you made an estimate of what was considered to be the value of the property of these companies by taking the entire length of their roads in California, and in other States, and in apportioning so much of that value as you thought should belong to the State of California in proportion to the mileage within the State?

A. No, sir. The calculation that I made of any roads were all in the State of California. I did not make any calculation of any other roads.

Q. Did you not take into consideration any property, or the franchise of any of these companies outside of the State of California?

A. I did not, but some of the other members did.

Q. Which of the other members?

A. Mr. Markly was about one of the best, and Mr. Gildea and Mr. Maslin and Morehouse, and I worked on the small ones.

JOHN P. DUNN, called and sworn as a witness for plaintiff, in rebuttal, testified as follows:

By Mr. LANGHORNE:

Q. Mr. Dunn, what State office, if any, did you occupy during the years 1887 and 1888?

A. State comptroller.

Q. Did you have any connection with the State board of equalization during those years?

A. *Ex officio* a member of that board.

369 Q. Were you present at the meeting of that board August 13th, 1887?

A. I believe I was.

Q. Did a question in regard to the assessment of the State board of equalization upon the Southern Pacific and Central Pacific Railroad Companies' properties for the year 1887 come before that meeting?

A. I believe that is the date. I cannot state without referring to the record.

Q. You have seen the records of the secretary of the board in regard to those assessments?

A. I believe so.

Q. Was there any action of the board at that meeting in regard to assessing or valuing what was claimed by the Central Pacific Railroad Company and the Southern Pacific Railroad Company to be a Federal franchise?

A. Not that I can recall.

Q. Was there any discussion at that meeting by the members of the board in regard to assessing what was claimed to be a Federal franchise by the Southern Pacific Railroad Company?

A. Not that I can recall.

Q. Was there, to your knowledge, at that meeting, any valuation placed upon what was claimed to be the Federal franchise owned by the Central Pacific Railroad Company and the Southern Pacific Railroad Company for the purposes of assessment for the year 1887?

A. There was no such valuation placed upon the property.

370 In other words, the Federal franchise, so far as my computations are concerned, was not considered at all; nor was it considered, so far as my knowledge goes, by any member of the board. There was no member of the board that stated that he proposed to include in that valuation a valuation for a Federal franchise, so far as my memory goes, not alone at that meeting, but at any previous meeting.

Q. You were also present, were you, at the meeting of said board at which the board assessed the properties of the Central Pacific Railroad Company and the Southern Pacific Railroad Company for the year 1888, were you not?

A. I believe I was not present when the original assessment was made, but I was present when it came up for reconsideration.

Q. Have you heard the minutes introduced in evidence here, in regard to the meeting of the board in 1888, which showed that the attorney general was called on for his opinion in regard to certain matters?

A. Yes, sir.

Q. You were present at that meeting?

A. I was not present, I think, at that meeting, but I say I have heard the minutes. You asked me if I heard the minutes read of that meeting.

Q. Well, were you present at any discussion by yourself or members of the board in regard to the assessment of what was claimed to be the Federal franchise of the Central Pacific Railroad Company and the Southern Pacific Railroad Company for the year 1888?

A. Prior to the date of the assessment of those properties, some time during that year, the matter was talked of considerably

371 by the board—by the members of the board.

Q. In your presence?

A. In my presence. Well, I cannot say now whether it was at a

meeting or at the meeting-room of the board; but it was talked of by the members, and I know that I went and saw the attorney general, Mr. Johnson, at that time, and I conversed with him a number of times about it, and insisted that it was an outrage that the findings of a certain court in the past should show that the State board of equalization had assessed a Federal franchise, because it had simply assessed but one franchise, and that it was necessary for us, in some shape, to have the matter upon our record, in order to avoid the possibility of having such a false finding made in the future.

Q. As a matter of precaution?

A. As a matter of precaution.

Q. Well, did you want the matter shown by the record for the purpose solely as a matter of precaution?

A. Yes, sir; as a matter of precaution. Just as I want the record to say that we did not assess steamboats or the four miles of water across the bay of San Francisco, as four miles of road. Just as I want the record to say that we did not assess fences. There was no question but that we did not assess those things; yet the record that was sent up to the United States Supreme Court showed that we did.

Q. That is for prior years?

372 A. Yes, sir; for the years 1883 and 1884.

Q. Then the intention of making that record in 1888 to include only the State franchise, as I understand then, was solely as a matter of precaution in view of these findings made in the former cases?

A. Yes, sir; it was my desire that it should be made that way, and it was the understanding that it was intended to accomplish that purpose by all the members of the board.

Q. You say only one franchise was assessed in 1887. Which road have you reference to?

A. To all the roads that were assessed: Central Pacific, Southern Pacific, California Pacific, Northern railway and San Pablo and Tulare.

Q. Well, which franchise did you understand that to be?

A. There was no question that it was simply the franchise to be assessed.

Q. What franchise?

A. The franchise reported to us by the railroad company. We assessed those things as they reported.

Q. Upon the blank statement furnished to the company by the board, upon which to make their report?

A. Yes, sir.

Q. Which has been offered in evidence as Plaintiff's Exhibit 7? Have you seen it?

A. Well, I presume I have seen it in the past. I have not seen it since I came here.

(The witness is handed Plaintiff's Exhibit 7.)

373 Q. Will you please examine it, Mr. Dunn. This was the sworn statement of the Southern Pacific Railroad Company in regard to its property and its valuation for the year 1887, is it not?

A. It appears to be; yes, sir. I have no doubt this is the statement.

Q. Upon blanks furnished by the State board itself?

A. Yes, sir; I think these are blanks furnished by the board.

Q. Look at the language in regard to the description—the value of the franchise and the entire roadway, road-bed and rails within the State?

A. Yes, sir.

Q. What was intended by the State board to be meant and included in the expression of "franchise" in that statement against the railroad company?

Mr. FOULDS: I object, if your honor please, to the testimony as incompetent. He is asking for the opinion of the witness, and it is not the best evidence because the paper speaks for itself.

The objection was overruled by the court, to which ruling defendant then and there duly excepted.

A. It was simply intended to be the franchise as reported by the railroad company to us.

Q. Well, when this report was filed and returned as sworn to, as it appears to be, by the Southern Pacific Railroad Company, returning a franchise within the State of California, what
374 did you understand, or the board understand, to be meant by that railroad company in using that term?

Objected to by the defendant as incompetent.

Objection overruled by the court, to which ruling defendant then and there duly excepted.

A. Well, I cannot say exactly what other members of the board understood, but I know my understanding of this matter all along was that we should assess their franchise as reported to us by them.

Q. As reported to you by them?

A. Yes, sir.

Q. In other words, you accepted as values—you accepted then the description that they themselves furnished of their property?

A. Yes, sir; we necessarily had to.

Q. Who represented the railroad company, the Southern Pacific Railroad Company, at that meeting of August 13th, 1887?

A. Well, in these tax matters and in these assessment matters, Mr. Ryan represented the railroad company before the board at each session, and there were other gentlemen came up also, but Mr. Ryan was the principal representative.

Q. Did he, or any other representative of that railroad company, claim before the board at any meeting held in reference to the tax or assessment of 1887, that the word "franchise," as used by it in

its said statement, which you hold, was ambiguous in any respect, and included anything more than the State franchise?

375 Objected to by the defendant as irrelevant and immaterial.

Objection overruled by the court, to which ruling defendant then and there duly excepted.

A. I do not recall the statements about it particularly, but, as to some conversations, I recall.

Q. Well, did he claim that the word franchise, as returned by them, describing their franchise, was ambiguous in any respect?

Same objection, and same ruling and exception.

A. Not that I can recall.

Q. Did he claim that the words in that statement, "franchise within the State," included any Federal franchise which that road, the Southern Pacific, claimed to have?

Objected to by the defendant as incompetent, irrelevant and immaterial.

The objection was overruled by the court, to which ruling defendant then and there duly excepted.

A. Not that I can recall. I might say in explanation of that that at one session, if not at a number of the sessions, of the board, Mr. Ryan stated that the franchise was simply worth what it cost to get it from each county clerk in the State—each county in the State through which the road ran. In other words, the franchise was almost valueless. It was only worth the paper and what it would cost them to get it from each county clerk's office through which the road ran.

376 Q. Well, did he say anything about a Federal franchise—make any statement at all?

A. Not that I can recall.

Cross-examination.

By Mr. FOULDS:

Q. You were well aware, Mr. Dunn, all this time that the Southern Pacific Railroad Company have valuable franchises which they have derived from the Government of the United States?

A. I believe they had; yes, sir.

Q. Now, in making up your estimate of the value of their property, you did not rely upon the statements which were furnished by Mr. Ryan as the agent of the company?

A. Not in making up the value; no, sir.

Q. You simply took the statement and made up the value?

A. Oh, I was guided to some extent.

Q. Well, in no case was there an assessment, made within a very large sum, greater than the estimate which was presented to you by Mr. Ryan?

A. Well, I don't know about a large sum. I think the assessments were larger than Mr. Ryan reported.

Q. Well, it amounted to millions of dollars sometimes?

A. Well, probably so.

Q. Now, on what theory did you act, or what system did you adopt in making those assessments? You disregarded Mr. Ryan's figures, as appears from your assessment. Now, on what
377 theory did you arrive at your figures—take the Southern Pacific assessment for the year 1887, for example?

A. Well, there were many elements which we took into consideration as to the value of the stock, the value of the bonds, the earning capacity of the road, its future prospects, the income for that year, the prospects for the succeeding year. There were many elements that entered into consideration; and, as I answered the question of why we did not accept the statement of Mr. Ryan as to the valuation. We did not accept his statement with regard to any particular valuation—not alone franchise, road-bed, roadway, rails and rolling stock.

Q. Then, as I understand you, you took the entire value of the capital stock of the company—the value of their bonds—and you computed from them the value of the proportion of the road that was running in California as the basis of your estimate?

A. I stated those are one of the things that we took into consideration; not the basis of it, remember, but one of the things taken into consideration in forming our estimate.

Q. Now, the bonds of the road were issued on the entire road, were they not?

A. I understand so.

Q. And the capital stock includes the entire length of the road, whether in California or in other States?

A. Well, I understand that the bonds of the Southern Pacific are simply upon the property within this State.

378 Q. Well, the capital of the railroad company is the capital stock of the entire corporation?

A. I do not understand it to be outside of California, but entirely within the State. I think such a statement was made before our board in 1887 and 1888—I am speaking now of the Southern Pacific.

Q. And now you also state, if I understand you correctly, that you considered their earnings—the earnings of the road—in computing the value?

A. Yes, sir.

Q. Now those earnings were earnings from the entire road, whether they were in the State of California or not, were they not?

A. Yes, sir.

Q. Then, in your adopting those earnings as an element in ascertaining the value of the road, must you not necessarily have been, to some extent at least, including the value of those franchises which they operated by virtue of the grant of power from the acts of Congress which are in evidence here?

A. I do not think it is necessary. I do not think they are necessarily included in making up——

Q. If those acts of Congress were necessary to the operation of

their entire road, and their business was derived through the franchises that they operated under, under those acts of Congress, then must not those Federal franchises have entered to some extent into your calculations?

379 A. I understand the Southern Pacific railroad in this State might be operated on a State franchise.

Q. Well, you know that it operated——

A. Under both franchises, I understand.

Q. And its earnings are the earnings of the entire road? You did not segregate the earnings within the State of California?

A. Well, Mr. Foulds, if you will allow me to explain, I will simply state this to you.

Q. Well, just answer my questions and then explain afterwards.

A. Very well. We did endeavor to, as nearly as we could, consider the number of miles of road, considering the volume of business in this State with the volume of business out of this State and that is always an element.

Q. Now, is it not a fact, Mr. Dunn, that the question of this Federal franchise was a topic in particular of constant discussion amongst the members of the State board of equalization for several years prior to 1888?

A. It was a topic of discussion, yes, sir.

Q. It had been raised by the railroad companies?

A. Yes, sir.

Q. And it had been discussed by the board when you assessed the franchises of these companies in years prior to 1888? You intended to and did assess them for all their corporate franchises within the State of California, did you not?

A. No, sir; I did not. No member of the board, so far as
380 I am aware, at any time made a motion to include the Federal franchise in these assessments.

Q. What did you assess?

A. We simply assessed the franchise of the company.

Q. Well, what corporate franchise or right derived from any government did you exclude?

A. Well, we simply assessed the franchise that the constitution required us to assess.

Q. I am not asking you for a definition of what the constitution required you to assess; but I say, what corporate franchises belonging to either of these two companies did you ever exclude from consideration at any time prior to 1888?

A. Well, I excluded the Federal franchise from my consideration in view of the fact of the decision by the Supreme Court, and in view of the fact of discussions on that question, and, if you will allow me to go back and explain, I will explain the reasons why.

Q. Well, I don't require any explanations now. You may explain hereafter, if you wish. Now, you say you excluded the Federal franchise, did you?

A. I say I did not include that in my estimate of the valuation put upon the property.

Q. But you did assess the entire franchise of these companies, whatever it might have been?

A. We assessed the franchise.

Q. But you cannot say you excluded the Federal franchise, can you?

A. Well, I can say that it was not taken into consideration
381 by myself, nor was it taken into consideration, so far as I am aware, at this meeting of the board by any member of the board, in placing a valuation upon the property.

Q. But your valuation was placed upon the figures of the earnings, which must have been the result of these franchises, both State and Federal?

A. Well, I don't know as to that. I told you that we endeavored in many ways to find out the proper valuation to put upon these roads—the earning capacity, the prospects of the road, the bonded indebtedness, etc.

Q. And you mean to tell the court now, Mr. Duun, that you do not regard the prospects of the road and the earning capacity of the road as in any way dependent upon these Federal franchises which they held?

A. Well, I don't know what I propose to tell the court. I simply tell you that I did not take that into consideration as an element in placing a value upon that property, no more than I took into consideration placing an estimate upon the value of the California Pacific or the Northern railroad. We arrived at our conclusions, at least I did, in assessing those properties, the same as in assessing the property of the Central Pacific and Southern Pacific; and so I think all the members of the board arrived at their conclusion in the same way.

All of the evidence introduced upon the part of plaintiff tending to show that the Federal franchises of the defendant were as-
382 sessed by the State board of equalization, was subject to objection on the part of plaintiff on the ground of incompetency, which objection was overruled, *pro forma*, by the court, with the understanding that a motion to strike out same might thereafter be made by counsel for plaintiff.

On the oral argument of the cause, the following proceedings occurred with reference to said evidence:

"The COURT (to counsel for plaintiff): In relation to that parol evidence which you objected to, I anticipate a full argument upon the objection, and understand that the objection was made simply *pro forma* to save the point which would probably be renewed by motion to strike out. That motion, however, was not made."

"Mr. COTTON (for plaintiff, in reply to the court): Your honor can consider that motion as renewed on my part, to strike out the testimony, upon the grounds heretofore urged; that the plaintiff moved the court to order stricken out from the record all the testimony in relation to what was considered or embraced in the assessment made by the State board of equalization for the year 1887."

"Mr. FOULDS (for defendant): Of course we resist that motion."

"The COURT: Well, that will be submitted and the argument can proceed."

Thereafter, and before the court had ruled upon the motion to strike out, Mr. Cotton, of counsel for plaintiff, said to the court:

383 "Your honor, in regard to that motion that I made to strike out the oral testimony upon conferring with my associates, as I wish to try this case with a great degree of caution—and, as if that testimony is immaterial, your honor won't regard the testimony, I will withdraw the motion to strike out, made during my argument."

"The COURT (in answer): Very well."

In its written opinion, upon which the findings were based, the court, after determining as a fact, from a proponderance of the evidence before it, that the Federal franchise of defendant was not assessed or included in the assessment of the property of defendant by the State board of equalization for the year 1887, uses the following language: "But if the parol evidence offered did not weigh in plaintiff's favor, and if by a preponderance of such evidence defendants could have shown that the State intended to, and did include a Federal franchise in the assessment, I think the court would have to disregard it as incompetent. The effect of such parol evidence would be to contradict the record, which cannot be done.

"The best and only evidence of the acts and intentions of deliberative bodies must be drawn from the record of its intentions." * * * "From both standpoints of fact and of law, the findings must be that a Federal franchise was not included in these assessments."

Thereafter, to wit, on the 3rd day of February, A. D. 1893,

384 the court made and filed its findings of fact and conclusions of law in said cause in favor of plaintiff and against defendant.

Within the time allowed by law, said defendant served and filed its notice of intention to move for a new trial, as follows, to wit:

Notice of Intention to Move for New Trial.

(Title of Court and Cause.)

Please take notice that the defendant above named intends to move the court to grant a new trial in this case, upon the following grounds, viz:

1st. Insufficiency of the evidence to justify the decision of the court.

2nd. That the decision of the court is against law.

3d. Error in law occurring at the trial and excepted to by the defendant.

The said motion will be made upon a statement of the case.

H. S. BROWN,
FOSHAY WALKER,
J. E. FOULDS,
Attorneys for Defendant.

385 To The People of the State of Cal., the said plaintiff, and Langhorne and Miller, attorneys for plaintiff.

Thereafter, by stipulation of counsel and order of court, the time within which defendant was entitled to prepare and serve its statement on motion for new trial herein was extended to and including the 27th day of March, A. D. 1893.

Defendant's Assignment and Specification of Errors.

I.

The evidence is insufficient to justify the decision of the court as to the first cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equalization of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its verified statement thereof, furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

386 (*b.*) Because it does not appear from the evidence that the defendant has never at any time paid the State tax amounting to one hundred thousand three hundred and twenty ($100,320.00) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time, five per cent. of said State tax, to wit, the sum of five thousand and fifteen ($5,015.00) dollars was by the comptroller of said State added to said State tax for delinquency; or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R. Cotton as counsel fees, is not a reasonable or just compensation for legal services rendered by them in the institution and prosecution of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of, the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action, and upon the uncertainty and mere possibility of collection, and upon supposed services, which may hereafter be rendered by said counsel in connection with said cause of action in other courts and places and in other proceedings, which may or may not be taken or rendered;

387 The evidence further shows, and it is nowhere contradicted, that A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no

evidence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of railways, nor the duplicate record of apportionment of railway assessments for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any apportionment of the assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, within the State of California, for the year 1887, was made by the State board of equalization, as required by section 10 of article XIII of the constitution of this State, to any of the cities, towns, townships or districts in which said railroad is located; whereas, the evidence shows, and it is nowhere contradicted, that at the time of the levy of the rate of county taxes, by the supervisors of the counties of San Benito, San Bernardino, San Luis Obispo and Santa Clara, for the year
388 1887, certain special school taxes were levied in various school districts of each of said counties, by the supervisors thereof, and a special tax in the city of Los Angeles, in the county of Los Angeles, by the supervisors of said county, which were collectible in the same manner as other county taxes, and the rate of said special school taxes was included in, and became part of, said county rate of taxation in each of said counties, and is so blended therewith that it cannot be segregated therefrom.

II.

The evidence is insufficient to justify the decision of the court as to the second cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equalization of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its verified statement thereof, furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

(*b.*) Because it does not appear from the evidence that the de-
389 fendant has never at any time paid the county tax, amounting to two thousand nine hundred and fifty-nine and forty-one hundredths ($2,959.41) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887, at six o'clock p. m., or at any other time, five per cent. of said county tax, to wit, the sum of one hundred and forty-seven and ninety-seven hundredths ($147.97) dollars, was by the controller of said State added to said county tax for delinquency; or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R. Cotton, as counsel fees, is not a reasonable or just compensation for legal services rendered by them in the institution and prosecution of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of, the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action, and upon the uncertainty and mere possibility of collection, and upon supposed services, which may hereafter be rendered by said counsel in connection with said cause of action in other courts and places and in other proceedings, which may or may not be taken or rendered;

The evidence further shows, and it is nowhere contradicted,
390 that A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no evidence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of railways, nor the duplicate record of apportionment of railway assessments for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any apportionment of the assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, within the State of California, for the year 1887, was made by the State board of equalization as required by section 10 of article XIII of the constitution of this State to any of the cities, towns, townships or districts in which said railroad is located.

III.

The evidence is insufficient to justify the decision of the court as to the third cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equal-
391 ization of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its verified statement thereof, furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

(*b.*) Because it does not appear from the evidence that the defend-

ant has never at any time paid the county tax amounting to thirty-four thousand four hundred and seventy-nine and four-hundredths ($34,479.04) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887, at six o'clock p. m., or at any other time, the sum of five per cent. of said county tax, to wit, the sum of $1,723.95, was, by the comptroller of said State, added to said county tax for delinquency; or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R.
392 Cotton as counsel fees, is not a reasonable or just compensation for legal services rendered by them in the institution and prosecution of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action and upon the uncertainty and mere possibility of collection, and upon supposed services, which may hereafter be rendered by said counsel in connection with said cause of action, in other courts and places and in other proceedings, which may or may not be taken or rendered;

The evidence further shows, and it is nowhere contradicted, that A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no evidence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of railways, nor the duplicate record of apportionment of railway assessments for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any appor-
393 tionment of the assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, within the State of California, for the year 1887, was made by the State board of equalization as required by section 10 of article XIII of the constitution of this State, to any of the cities, towns, townships or districts in which said railroad is located.

IV.

The evidence is insufficient to justify the decision of the court as to the fourth cause of action in the amended complaint:

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equalization of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its verified

statement thereof, furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

(*b.*) Because it does not appear from the evidence that the defendant had never at any time paid the county tax amounting to
394 twenty thousand one hundred and forty-nine and three-hundredths ($20,149.03) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887, at six o'clock p. m., or at any other time, five per cent. of said county tax, to wit, the sum of one thousand and seven and forty-five hundredths ($1,007.45) dollars, was by the comptroller of said State added to said county tax for delinquency, or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R. Cotton as counsel fees, is not a reasonable or just compensation for legal services rendered by them in the institution and prosecution of said cause of action, for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action, and upon the uncertainty and mere possibility of collection, and upon supposed services, which may hereafter be rendered by said counsel in connection with said cause of action in other courts and places and in other proceedings, which may or may not be taken or rendered;

The evidence further shows, and it is nowhere contradicted, that
A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various
395 stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no evidence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of railways, nor the duplicate record of apportionment of railway assessments for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any apportionment of the assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad within the State of California, for the year 1887, was made by the State board of equalization as required by section 10 of article XIII of the constitution of this State, to any of the cities, towns, townships or districts in which said railroad is located; whereas, the evidence shows, and it is nowhere contradicted, that at the time of the levy of the rate of county taxes by the supervisors of the county of Los Angeles, for the year

1887, certain special taxes were levied in the city of Los Angeles, in said county, by the supervisors thereof, which were collectible in the same manner as other county taxes, and the rate of said special taxes was included in, and became part of, said county rate
396 of taxation in said county, and is so blended therewith that it cannot be segregated therefrom.

V.

The evidence is insufficient to justify the decision of the court as to the fifth cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equalization of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its verified statement thereof, furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

(*b.*) Because it does not appear from the evidence that the defendant has never, at any time, paid the county tax, amounting to thirteen thousand and seventy and fifteen-hundredths ($13,070.15) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887, at six o'clock, p. m., or at any other time, five per cent. of said county tax, to wit, the sum of six
397 hundred and fifty-three and fifty-hundredths ($653.50) dollars, was, by the comptroller of said State, added to said county tax for delinquency, or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Laughorne & Miller and A. R. Cotton, as counsel fees, is not a reasonable or just compensation for legal services rendered by them in the institution and prosecution of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of, the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action, and upon the uncertainty and mere possibility of collection, and upon supposed services, which may hereafter be rendered by said counsel in connection with said cause of action in other courts and places and in other proceedings, which may or may not be taken or rendered;

The evidence further shows, and it is nowhere contradicted, that A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no evi-

dence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

398 (*d.*) Because neither the duplicate record of assessments of railways, nor the duplicate record of apportionment of railway assessments for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any apportionment of the assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, within the State of California, for the year 1887, was made by the State board of equalization as required by section 10 of article XIII of the constitution of this State, to any of the cities, towns, townships or districts in which said railroad is located.

VI.

The evidence is insufficient to justify the decision of the court as to the sixth cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equalization of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its verified statement thereof, furnished said board by defendant on or

399 about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

(*b.*) Because it does not appear from the evidence that the defendant has never at any time paid the county tax, amounting to two thousand nine hundred and forty-four and eleven-hundredths ($2,944.11) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887, at 6 o'clock p. m., or at any other time, five per cent. of said county tax, to wit, the sum of one hundred and forty-seven and twenty-hundredths ($147.20) dollars, was by the comptroller of said State added to said county tax for delinquency; or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R. Cotton as counsel fees, is not a reasonable or just compensation for legal services rendered by them in the institution and prosecution of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of, the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action,

400 and upon the uncertainty and mere possibility of collection, and upon supposed services, which may hereafter be rendered

by said counsel in connection with said cause of action in other courts and places and in other proceedings, which may or may not be taken or rendered;

The evidence further shows, and it is nowhere contradicted, that A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no evidence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of railways, nor the duplicate record of apportionment of railway assessments for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any apportionment of the assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, within the State of California, for the year 1887, was made by said State board of equalization as required by section 10 of article XIII of the constitution of this State, to any of the cities, towns, townships or districts in which said railroad is located; whereas, the evidence shows,
401 and it is nowhere contradicted, that at the time of the levy of the rate of county taxes by the supervisors of the county of San Benito for the year 1887, certain special school taxes were levied in various school districts of said county by the supervisors thereof, which were collectible in the same manner as other county taxes, and the rate of said special school taxes was included in, and became a part of, said county rate of taxation in said county, and is so blended therewith that it cannot be segregated therefrom.

VII.

The evidence is insufficient to justify the decision of the court as to the seventh cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equalization of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by the defendant in its verified statement thereof, furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

402 (*b.*) Because it does not appear from the evidence that the defendant has never at any time paid the county tax amounting to thirty thousand four hundred and sixty-eight and fifty-six hundredths ($30,468.56) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887,

at six o'clock p. m., or at any other time, five per cent. of said county tax, to wit, the sum of one thousand five hundred and twenty-three and forty-two hundredths ($1,523.42) dollars, was by the comptroller of said State added to said county tax for delinquency, or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R. Cotton, as counsel fees, is not a reasonable or just compensation for legal services rendered by them in the institution and prosecution of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of, the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action, and upon the uncertainty and mere possibility of collection and upon supposed services which may hereafter be rendered by said counsel in connection with said cause of action in other courts and places and in other proceedings, which may or may not be taken or rendered;

403 The evidence further shows, and it is nowhere contradicted, that A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no evidence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of railways, nor the duplicate record of apportionment of railway assessments, for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any apportionment of the assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, within the State of California, for the year 1887, was made by the State board of equalization as required by section 10 of article XIII of the constitution of this State, to any of the cities, towns, townships or districts in which said railroad is located; whereas, the evidence shows, and it is nowhere contradicted, that at the time of the levy of the rate of county taxes by the supervisors of the county of San Bernardino, for the year 1887, certain special school taxes were levied in various school districts of said county, by the supervisors thereof, which were

404 collectible in the same manner as other county taxes, and the rate of said special school taxes was included in, and became part of, said county rate of taxation in said county, and is so blended therewith that it cannot be segregated therefrom.

VIII.

The evidence is insufficient to justify the decision of the court as to the eighth cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equalization of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its verified statement thereof furnished said board by defendant on or about the seventh day of April 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

(*b.*) Because it does not appear from the evidence that the defendant has never at any time paid the county tax amounting to twenty-five thousand four hundred and thirty-two and sixty-five hundredths ($25,432.65) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887,
405 at six o'clock p. m., or at any other time, five per cent. of said county tax, to wit, the sum of one thousand two hundred and seventy-one and sixty-three hundredths ($1,271.63) dollars, was by the comptroller of said State added to said county tax for delinquency, or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R. Cotton, as counsel fees, is not a reasonable or just compensation for legal services rendered by them in the institution and prosecution of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of, the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action, and upon the uncertainty and mere possibility of collection, and upon supposed services, which may hereafter be rendered by said counsel in connection with said cause of action in other courts and places and in other proceedings, which may or may not be taken or rendered;

The evidence further shows, and it is nowhere contradicted, that A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is
406 no evidence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of railways, nor the duplicate record of apportionment of railway assessments for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any apportionment of the assessment of the franchise, roadway, road-bed, rails

and rolling stock of defendant's railroad within the State of California, for the year 1887, was made by the State board of equalization as required by section 10 of article XIII, of the constitution of this State, to any of the cities, towns, townships or districts in which said railroad is located.

IX.

The evidence is insufficient to justify the decision of the court as to the ninth cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equalization of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its
407 verified statement thereof furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

(*b.*) Because it does not appear from the evidence that the defendant has never at any time paid the county tax, amounting to one thousand three hundred and sixty-three and forty-five hundredths ($1,363.45) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887, at six o'clock p. m., or at any other time, five per cent. of said county tax, to wit, the sum of sixty-eight and seventeen-hundredths ($68.17) dollars, was by the comptroller of said State added to said county tax for delinquency, or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R. Cotton, as counsel fees, is not a reasonable or just compensation for legal services rendered by them in the institution and prosecution of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in
408 excess of the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action, and upon the uncertainty and mere possibility of collection, and upon supposed services, which may hereafter be rendered by said counsel in connection with said cause of action in other courts and places and in other proceedings, which may or may not be taken or rendered;

The evidence further shows, and it is nowhere contradicted, that A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no evi-

dence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of railways, nor the duplicate record of apportionment of railway assessments for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for that year.

X.

The evidence is insufficient to justify the decision of the court as to the tenth cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equalization
409 of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its verified statement thereof, furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

(*b.*) Because it does not appear from the evidence that the defendant has never at any time paid the county tax, amounting to nine hundred and thirty-four and fourteen-hundredths ($934.14) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887, at 6 o'clock, p. m., or at any other time, five per cent. of said county tax, to wit, the sum of forty-six and seventy-hundredths ($46.70) dollars was by the comptroller of said State added to said county tax for delinquency, or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R. Cotton, as counsel fees, is not a reasonable or just compensation for legal services rendered by them in the institution and prosecution
410 of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of, the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action, and upon the uncertainty and mere possibility of collection, and upon supposed services, which may hereafter be rendered by said counsel in connection with said cause of action in other courts and places, and in other proceedings which may or may not be taken or rendered;

The evidence further shows, and it is nowhere contradicted, that A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no evidence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of railways, nor the duplicate record of apportionment of railway assessments, for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any apportionment of the assessment of the franchise, roadway, road-bed,
411 rails and rolling stock of defendant's railroad within the State of California for the year 1887, was made by the State board of equalization as required by section 10 of article XIII of the constitution of this State, to any of the cities, towns, townships or districts in which said railroad is located; whereas, the evidence shows, and it is nowhere contradicted, that at the time of the levy of the rate of county taxes, by the supervisors of the county of San Luis Obispo, for the year 1887, certain special school taxes were levied in various school districts of said county by the supervisors thereof, which were collectible in the same manner as other county taxes, and the rate of said special school taxes was included in, and became part of, said county rate of taxation in said county, and is so blended therewith that it cannot be segregated therefrom.

XI.

The evidence is insufficient to justify the decision of the court as to the eleventh cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equalization of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its verified statement thereof, furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of
412 section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

(*b.*) Because it does not appear from the evidence that the defendant has never at any time paid the county tax, amounting to three thousand two hundred and eight and forty-two hundredths ($3,208.42) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887, at six o'clock p. m., or at any other time, five per cent. of said county tax, to wit, the sum of one hundred and sixty and forty-two hundredths ($160.42) dollars, was by the comptroller of said State added to said county tax for delinquency, or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R. Cotton, as counsel fees, is not a reasonable or just compensation for legal

services rendered by them in the institution and prosecution of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of, the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this
413 action, and upon the uncertainty and mere possibility of collection, and upon supposed services which may hereafter be rendered by said counsel in connection with said cause of action in other courts and places and in other proceedings which may or may not be taken or rendered;

The evidence further shows, and it is nowhere contradicted, that A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no evidence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of railways nor the duplicate record of apportionment of railway assessments, for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any apportionment of the assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, within the State of California, for the year 1887, was made by the State board of equalization as required by section 10 of article XIII of the constitution of this State, to any of the cities, towns, townships or districts in which said railroad is located.

414 XII.

The evidence is insufficient to justify the decision of the court as to the twelfth cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equalization of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its verified statement thereof, furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

(*b.*) Because it does not appear from the evidence that the defendant has never at any time paid the county tax amounting to five thousand three hundred and ninety-five and twenty-four hundredths ($5,395.24) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887, at six o'clock, p. m., or at any other time, five per cent. of said county tax, to wit, the sum of two hundred and sixty-nine and seventy-six hun-

dredths ($269.76) dollars, was by the comptroller of said State
415 added to said county tax for delinquency, or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R. Cotton, as counsel fees, is not a reasonable or just compensation for legal services rendered by them in the institution and prosecution of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of, the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action, and upon the uncertainty and mere possibility of collection, and upon supposed services, which may hereafter be rendered by said counsel in connection with said cause of action in other courts and places and in other proceedings, which may or may not be taken or rendered;

The evidence further shows, and it is nowhere contradicted, that A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no evidence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of
416 railways, nor the duplicate record of apportionment of railway assessments for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any apportionment of the assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, within the State of California, for the year 1887, was made by the State board of equalization as required by section 10 of article XIII of the constitution of this State, to any of the cities, towns, townships or districts in which said railroad is located; whereas, the evidence shows, and it is nowhere contradicted, that at the time of the levy of the rate of county taxes, by the supervisors of the county of Santa Clara, for the year 1887, certain special school taxes were levied in various school districts of said county, by the supervisors thereof, which were collectible in the same manner as other county taxes, and the rate of said special school taxes was included in, and became part of, said county rate of taxation in said county, and is so blended therewith that it cannot be segregated therefrom.

XIII.

The evidence is insufficient to justify the decision of the court as to the thirteenth cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is no-
417 where contradicted, that the assessment of the State board of equalization of the State of California, made on the 13th day

of August, A. D. 1887, did not describe the franchise, road-bed, roadway, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its verified statement thereof, furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

(*b.*) Because it does not appear from the evidence that the defendant has never at any time paid the county tax, amounting to four hundred and six and sixty-eight hundredths ($406.68) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887, at six o'clock p. m., or at any other time, five per cent. of said county tax, to wit, the sum of twenty and thirty-three hundredths ($20.33) dollars, was by the comptroller of said State added to said county tax for delinquency, or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R. Cotton as counsel fees, is not a reasonable or just compensation for
418 legal services rendered by them in the institution and prosecution of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of, the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action, and upon the uncertainty and mere possibility of collection, and upon supposed services, which may hereafter be rendered by said counsel in connection with said cause of action in other courts and places and in other proceedings, which may or may not be taken or rendered;

The evidence further shows, and it is nowhere contradicted, that A. R. Cotton was not retained as counsel by the comptroller of State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no evidence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of railways, nor the duplicate record of apportionment of railway assessments for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any appor-
419 tionment of the assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, within the State of California, for the year 1887, was made by the State board of equalization as required by section 10 of article XIII of the con-

stitution of this State, to any of the cities, towns, townships or districts in which said railroad is located.

XIV.

The evidence is insufficient to justify the decision of the court as to the fourteenth cause of action in the amended complaint;

(*a.*) Because the evidence affirmatively shows, and it is nowhere contradicted, that the assessment of the State board of equalization of the State of California, made on the 13th day of August, A. D. 1887, did not describe the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad, then situated and being within said State, as the same was described by defendant in its verified statement thereof, furnished said board by defendant on or about the seventh day of April, 1887, pursuant to the provisions of section 3664 of the Political Code of said State, or in any verified statement thereof furnished said board by said defendant, and that said description was not as set forth in said first cause of action;

(*b.*) Because it does not appear from the evidence that the defendant has never at any time paid the county tax, amounting to ten thousand and three and thirty-five hundredths
420 ($10,003.35) dollars, set forth in said cause of action, or any part thereof, or that on the last Monday in December, 1887, at six o'clock p. m., or at any other time, five per cent. of said county tax, to wit, the sum of five hundred and sixteen-hundredths ($500.16) dollars, was by the comptroller of said State added to said county tax for delinquency, or that no part of said five per cent. has ever been paid by defendant;

(*c.*) Because the evidence shows, and it is nowhere contradicted, that the percentage upon the principal sum sued for in said cause of action, awarded to Messrs. Langhorne & Miller and A. R. Cotton as counsel fees, is not a reasonable or just compensation for legal services rendered by them in the institution and prosecution of said cause of action for the plaintiff, but that the same is purely speculative and contingent, and is at a much higher rate than, and in excess of, the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action, and upon the uncertainty and mere possibility of collection, and upon supposed services, which may hereafter be rendered by said counsel in connection with said cause of action in other courts and places and in other proceedings, which may or may not be taken or rendered;

The evidence further shows, and it is nowhere contradicted, that A. R. Cotton was not retained as counsel by the comptroller of
421 State, but only represented the attorney general at various stages of this litigation after the commencement of this action, and is therefore entitled to no fees as counsel herein; further, that there is no evidence that any counsel fees in said action have been incurred by the plaintiff or audited by the State board of examiners;

(*d.*) Because neither the duplicate record of assessments of railways,

nor the duplicate record of apportionment of railway assessments for the year 1887, in evidence in this action, show any unpaid taxes against this defendant for property assessed by the State board of equalization for that year;

(*e.*) Because it is not shown by the evidence that any apportionment of the assessment of the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad within the State of California, for the year 1887, was made by the State board of equalization as required by section 10 of article XIII of the constitution of this State, to any of the cities, towns, townships or districts in which said railroad is located.

XV.

The evidence is insufficient to justify the decision of the court as to and sustaining each and all of the causes of action set forth in said amended complaint, for the reason that it nowhere appears by the evidence of plaintiff what franchise of the defendant was assessed by the State board of equalization; that the particular de-
422 scriptions of the property assessed, as set forth in each of said causes of action, are descriptions of property included within the terms rolling stock, roadway, road-bed and rails, but do not describe or pretend to describe any franchise of the defendant; whereas, it affirmatively appears by the evidence of defendant, and is nowhere contradicted, that, in making said assessment, the State board of equalization included as an element of value therein the franchise of defendant derived from the Government of the United States under the several acts of Congress set forth in the findings; that the value of said franchises is so blended with the values of the other property assessed as to be incapable of segregation therefrom, and therefore said assessment, and the whole thereof is void.

XVI.

The evidence is insufficient to justify the decision of the court as to the apportionment of the assessment and the transmission thereof, set forth in finding of fact XXII, in this, that it affirmatively appears from the evidence, and is nowhere contradicted, that the only apportionment made, or attempted to be made, by said board was to the counties specified in the amended complaint and to the city and county of San Francisco, which was transmitted to the county auditors of said counties and the auditor of said city and county.

423 XVII.

The evidence is insufficient to justify the decision of the court, contained in finding of fact XXIII, that "at the time said assessment and apportionment were made as aforesaid by said State board of equalization, the assessment books or rolls for the said fiscal year had been completed and were in existence, and the assessment and valuation of defendant's property for the purposes of taxation for said fiscal year had been ascertained and fixed as provided by law, and said board in making said valuation and apportionment did exer-

cise all necessary powers relative to the equalization of values for the purpose of taxation," for the reason that there is no evidence that said books or rolls had been so completed or were in existence, nor could the same have been so completed or in existence under the law, nor is there any evidence that the assessment and valuation of defendant's property, for the purposes of taxation for said fiscal year, had been ascertained and fixed as provided by law, nor was there any provision of law by which the same could have been ascertained and fixed as aforesaid, nor is there any evidence that said board in making said valuation and apportionment, did exercise all necessary powers relative to the equalization of values, for the purpose of taxation, nor was there, nor could there be, power or authority vested by law in said board to equalize values in making the same.

424 XVIII.

The evidence is insufficient to justify the decision of the court, contained in finding of fact No. XXXV, that the State board of equalization, in making its said assessment and valuation, did not adopt a system of valuation which operated unequally, for the reason that the evidence shows that the rule of valuation adopted by said board was based upon the provisions of section 4 — article XIII of the constitution of this State, and only applied, and could only apply, to the property of railroad and other quasi-public corporations, and was therefore unequal in its operation and in conflict with the fourteenth amendment of the Constitution of the United States.

XIX.

The evidence is insufficient to justify the decision of the court, contained in finding of fact XXV, that the State board of equalization did not value nor assess defendant's franchise in excess of its actual value; because it appears from the evidence, and is nowhere contradicted, that in estimating and assessing defendant's franchise said board included and estimated the value of the franchise derived and held by defendant from and under the Government of the United States, and that such value was blended with the assessment of the other property of defendant in such a manner that it cannot be segregated therefrom.

425 XX.

The evidence is insufficient to justify the decision of the court, contained in finding of fact No. XXVI, for the reason that the evidence shows, and it is nowhere contradicted, that in making its assessment and valuation therefor of defendant's franchise said State board of equalization did include, assess and value all of the franchises and corporate powers held and exercised by defendant within the State of California under the acts of Congress mentioned in the prior findings of fact and pleaded in the answer of defendant, and that said board, in making said assessment and valuation therefor upon defendant's franchise, road-bed, roadway, rails and rolling

stock, for purposes of taxation for the fiscal year 1887, did include in its said assessment and valuation therefor, all the franchises then possessed by defendant, derived from and held under and by virtue of the acts of Congress of the United States, and under the authority of the Government of the United States, and that by reason of the premises, the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad were not valued and assessed by said State board of equalization, for purposes of taxation for the fiscal year 1887, at their actual value, and in proportion to their value respectively, but largely in excess thereof, to wit, to the extent of the value of said Federal franchises.

426 XXI.

The evidence is insufficient to justify the decision of the court, as set forth in finding of fact No. XXVI, for the reason that upon a comparison of said finding of fact with the opinion of the court upon which the same is based, as set forth in the statement on motion for new trial, it is manifestly impossible to determine therefrom whether said finding of fact is made upon a consideration of the evidence tending to establish that the Federal franchise of defendant was assessed or included in the assessment of the State board of equalization of the property of defendant for the year 1887, and upon the preponderance of evidence upon that point in favor of plaintiff; or whether said finding is made upon the presumption of fact of the regularity of the proceedings of the State board of equalization, and that the same is unassailed by reason of the incompetency of all evidence upon the part of defendant tending to rebut such presumption, and the consequent exclusion of such evidence from consideration by the court.

XXII.

The evidence is insufficient to justify the decision of the court, contained in finding of fact No. XXVII, that the boards of supervisors of the counties of Los Angeles, San Benito, San Bernardino, San Luis Obispo and Santa Clara, made and caused to be entered in the proper record book an order stating and declaring the
427 number of miles of track, and the assessed value per mile of such railway, lying in each city, town, township, school and road district, or lesser taxing district, in the county respectively through which defendant's railway ran, as fixed by the State board of equalization, for the reason that the evidence shows, and it is nowhere contradicted, that said State board of equalization in no manner apportioned or fixed the number of miles of track, and the assessed value per mile of such railway, lying in any city, town, township, school or road district, or lesser taxing district, of any county, or city and county, in the State of California, through which defendant's railway ran.

XXIII.

The evidence is insufficient to justify the decision of the court, as set forth in finding of fact No. XXVIII, for the reason that each

and all of the facts, specially pleaded in the answer of defendant, among its affirmative defenses, and not found upon in any of the preceding findings of fact, were fully supported by the evidence, or were of the character of facts of which the court was bound to take judicial notice; and hence each and all of said facts should have been found as alleged in said answer.

XXIV.

The evidence is insufficient to justify the decision of the court as to the 4th, 6th and 12th causes of action in this, that from the duplicate record of apportionment of railroad assessments for
428 1887, introduced in evidence, it is impossible to determine what rate of county taxation was fixed by the boards of supervisors of the counties of Los Angeles, San Benito, and Santa Clara, and transmitted to, or obtained by, the comptroller of State, upon which the amount of the county tax due to each of said counties, as set forth in the apportionment, is based; nor can it be ascertained from said apportionment how, or in what manner, the amount of taxes claimed to be due to each or either of said counties was arrived at or computed by said comptroller, or that any valid rate of taxation was ever fixed by the board of supervisors of either of said counties, for the reason that in the said record of the apportionment to each of said counties it is shown that two several and different rates were fixed, and the amount of taxes extended into the column designated in said record as showing the amount of county taxes due to each of said counties, does not correspond with a computation at either of said rates, or at the sum of said rates, at the assessed value of the property of defendant apportioned to each of said counties by said record.

XXV.

The decision of the court is against law, because it appears from the evidence and findings that all of the property of the defendant, upon which the taxes which are the subject of this action were assessed by the State board of equalization, was at the time of said assessment subject to a mortgage to secure bonds of defend-
429 ant issued and held by individuals, some of whom were residents of the State of California, and that no deduction was made from the valuation of said property for, or on account of, said encumbrance, although the same was well known to said board of equalization, but said property was assessed at its full, actual, cash value; whereas, all other property in the State of California, except that owned by railroad and other quasi-public corporations, was entitled to and received in its assessment for said fiscal year a deduction from its actual cash value of the amount of any mortgage, deed of trust, contract, or other obligation, by which a debt is secured, then subsisting upon it; that the said property of defendant was so assessed pursuant to the provisions of section 4 of article XIII of the constitution of the State of California, which is in conflict with the fourteenth amendment to the Constitution of the United States, and, by reason of the premises, said assessment and the whole thereof, and

all taxes levied thereunder, were and are null, void and of no effect, and no action can be maintained or judgment rendered therefor.

XXVI.

The decision of the court is against law, because it appears from the findings that the defendant was, at the time of the making of said assessment, the owner and holder of certain franchises of great value, derived from and held under and by virtue of certain acts of the Congress of the United States of America, and it appears
430 from the evidence that in estimating the value of the franchise, roadway, road-bed, rails and rolling stock of defendant's railroad in the State of California, in making the assessment thereof under which the taxes were levied for which this action is brought, the State board of equalization of the State of California included as an element of value and assessed the value of the Federal franchise aforesaid, but in making said assessment blended the same with the other properties of defendant assessed by it in such a manner that it cannot be segregated therefrom, and therefore said assessment and the whole thereof, and all the taxes levied thereunder, and for which this action is brought, are null, void and of no effect, and no action can be maintained or judgment rendered therefor.

XXVII.

The decision of the court is against law because it appears from the findings and evidence that in the counties of San Benito, San Bernardino, San Luis Obispo and Santa Clara, certain special school taxes had been, by the boards of supervisors of said several counties, duly levied in various school districts thereof, through which the railroad of defendant ran, for the year 1887, and a certain special tax in the city of Los Angeles, in the county of Los Angeles, by the board of supervisors of said county the rates whereof were included in and formed part of the county rates of levy for that year, and were levied upon the property of defend-
ant, and constitute a portion of the levies of the counties
431 aforesaid upon which the said several county taxes sued for in this action are based; that the State board of equalization never, in any manner, apportioned the assessment made by it of the property of said defendant, for said year, to any of the school districts of either of said counties, as required by the provisions of section 10 of article XIII of the constitution of this State, but such apportionment was attempted to be made by the boards of supervisors of said several counties to their respective school districts, and was and is null and void; that, by reason of the premises, the rates of said county levies, furnished to the State comptroller, upon which the taxes for said counties, sued for in this action, are based, and said taxes were not fixed and levied as required by the constitution and laws of this State, but are null, void and of no effect, and no action or judgment can be maintained or rendered therefor.

XXVIII.

The decision of the court that plaintiff is entitled to recover interest upon the principal sums of delinquent State and county taxes found by the several findings of fact to be due from defendant to plaintiff, from the 27th day of December, 1887, at the rate of seven per cent. per annum, up to the date of the entry of the judgment in this action is against law, for the reason that there is no statute or law of the State of California which commands, allows, or permits interest at any rate to be charged or collected after delinquency, or otherwise, upon such taxes
432 as are sued for in this action; and hence, plaintiff is not entitled to recover any interest whatever herein.

XXIX.

The decision of the court is against law, because counsel fees are allowed to plaintiff therein; whereas, the complaint contains no allegation, nor is there any evidence that any counsel fees have been incurred by plaintiff, or that any sum or amount therefor has been audited by the State board of examiners, as required by section 3668 of the Political Code of this State.

XXX.

The decision of the court is against law, because the evidence shows that the counsel fees allowed therein are not a reasonable or just compensation for legal services rendered by counsel for plaintiff in the institution and prosecution of this action, but that the same are purely speculative and contingent, and are fixed at a much higher figure than the actual value of such services, because entirely dependent upon the contingency of the success of the plaintiff in this action, and upon the uncertainty and mere possibility of collection, and upon supposed services which may hereafter be rendered by said counsel, in connection with this action in other courts and places, and in other proceedings, which may or may not be taken or rendered; and, further, that said A. R. Cotton was not retained as counsel by the comptroller of
433 State, but only represented the attorney general at various stages of this litigation after its commencement, and is therefore entitled to no fees as counsel herein.

XXXI.

The decision of the court that plaintiff is entitled to a penalty of five per cent. upon the several principal sums found to be due by the findings of fact is against law, for the reason that there is no evidence that any such penalty was added thereto on the 27th day of December, 1887, or at any other time, by the comptroller of State, or any officer of the State of California, authorized to impose such or any penalty.

XXXII.

The decision of the court is against law in this, that, whereas, by finding of fact No. XXVI, it is found that in making its assessment of defendant's property for the year 1887, the State board of equalization did not include, assess or value any franchise or corporate power held or exercised by defendant under any act or acts of Congress; yet, upon a comparison of said finding of fact with the opinion of the court upon which the same is based, as set forth in the statement on motion for a new trial, it is manifestly impossible to determine therefrom whether said finding of fact is made upon a consideration of the evidence tending to establish that such Federal franchise of defendant was assessed or included in the assessment of the State board of equalization of the property of de-
434 fendant for the year 1887, and upon the preponderance of evidence upon that point in favor of plaintiff, or whether said finding is made upon the presumption of fact of the regularity of the proceedings of the State board of equalization, and that the same is unassailed, by reason of the incompetency of all evidence upon the part of defendant tending to rebut such presumption, and the consequent exclusion of such evidence from consideration by the court.

XXXIII.

The decision of the court is against law, because it appears that the property of defendant was assessed by the State board of equalization under the provisions of section 10 of article XIII of the constitution of the State of California, and no provision is made by said constitution for the equalization of the assessed value thereof; whereas, all other property is entitled by said constitution to have its assessed value equalized by boards organized for the purpose of reviewing the action of assessors, and said provision of the constitution of the State of California is therefore unequal in its operation, denies to the defendant and other property-holders similarly situated the equal protection of the laws, and deprives the owners of their property without due process of law, and is repugnant to the fourteenth amendment to the Constitution of the United States and void.

435 XXXIV.

The decision of the court is against law in this, that it appears by the findings of fact that the State board of equalization of the State of California did assess, for the year 1887, the franchise of defendant; whereas, it also appears from said findings that said franchise is in whole or in part held under and derived from the Government of the United States, and cannot therefore be the subject of taxation by any State, county or municipal government.

XXXV.

The court erred in admitting in evidence that portion of the duplicate record of assessments of railways by the State board of

equalization, for the year 1887, relating to the assessment of the property of defendant for said year.

XXXVI.

The court erred in admitting in evidence that portion of the duplicate record of apportionment of railway assessments, for the year 1887, having reference to the apportionment of the assessment of the property of defendant for the year 1887.

XXXVII.

The court erred in permitting the witness W. W. Douglas to testify as to the non-payment of taxes by defendant.

436 XXXVIII.

The court erred in permitting the witness W. W. Douglas to testify as to the non-payment of any portion of the taxes, or interest, or penalty.

XXXIX.

The court erred in permitting evidence as to the value of counsel fees to be introduced by plaintiff.

XL.

The court erred in denying defendant's motion for a nonsuit.

XLI.

The court erred in admitting in evidence Plaintiff's Exhibit 5.

XLII.

The court erred in admitting in evidence Plaintiff's Exhibit 7.

XLIII.

The court erred in sustaining the objection of plaintiff to the following offer of evidence on the part of defendant, to be given by the witness, L. C. Morehouse, viz: "We offer to prove by this witness, that at every session, during every year of the existence of the State board of equalization, from the year 1883 and prior to the year 1888, the State board of equalization, in making its assessment of
437 the valuation of the property of the Southern Pacific Railroad Company, included in its total estimate of the value, the Federal franchise held by that company, by virtue of the acts of Congress of the United States, which have been introduced in evidence, and that the valuation of the Federal franchise was blended with the general assessment of that company in such a manner as to be indistinguishable from it and not capable of separation."

XLIV.

The court erred in permitting the following question to be put by counsel for plaintiff to the witness, L. C. Morehouse, viz: "Then, as a matter of fact, if the assessment against the franchise, roadway, road-bed and rails of this company contained the Federal franchise, then the statement to you furnished by the railroad company, including the same words, also contained the Federal franchise?"

XLV.

The court erred in permitting the following question to be put by counsel for plaintiff to the witness, L. C. Morehouse, viz: "And that in fixing the value which you assigned to the property represented by those words, you only intended to include the property which was legally assessable under the State constitution?"

XLVI.

The court erred in sustaining plaintiff's objection to the following question to the witness, E. W. Maslin, to wit: "From the
438 various sources of knowledge which you have enumerated, please state to the court what elements were taken into consideration by the State board of equalization in making the assessment of those two companies for the year 1887?"

XLVII.

The court erred in sustaining the objection to the following question to the witness E. W. Maslin, viz: "Did you hear any conversation between the members of the State board of equalization during the meeting when the assessment of this company was made for the year 1887, with reference to the elements that they proposed to and did include in the assessments?"

XLVIII.

The court erred in sustaining the objection to the following question to the witness, E. W. Maslin, viz: "At the time that the assessment of 1887 was made by the State board of equalization upon the property of the Southern Pacific Railroad Company, what was said and done at the meeting of the State board of equalization on that day in your presence?"

XLIX.

The court erred in disallowing defendant's offer of certain evidence by the witness, E. W. Maslin, which offer was as follows, to wit: "We now offer to prove by this witness that from the
439 time of the organization of the State board of equalization in 1880, down to and including the year 1887, that board had every year considered the value of the Federal franchise—that is, the franchise derived from the United States by the acts of Congress of the Government of the United States, belonging to and owned by the

Southern Pacific Railroad Company, as an element of value in assessing the total value of the property of this railroad company, and that in 1888, in consequence of the decision of the Supreme Court of the United States upon the subject, the State board of equalization for the first time ceased to consider this Federal franchise as an element of value, and hence reduced their valuation by the sum of two million five hundred thousand dollars on the Southern Pacific Railroad Company's property."

L.

The court erred in overruling defendant's objection to the following question put to the witness, C. E. Wilcoxen, viz: "All action taken by the board with reference to the assessment of railroads, and especially with reference to the Southern Pacific Railroad Company, were made matters of record either in the minutes of the board or in the assessment book of the board, were they not?"

LI.

The court erred in overruling defendant's objection to the following question propounded by plaintiff's counsel to the witness,
440 C. E. Wilcoxen, to wit: "Now, in that statement occurs the following: The value of the franchise and entire roadway, road-bed and rails within this State is $8,992,592. Did the board in assessing the property of the Southern Pacific Railroad Company for the year 1887, include any franchise other than here designated in the report of the Southern Pacific for that year?"

LII.

The court erred in overruling defendant's objection to the following question propounded by plaintiff's counsel to the witness, C. E. Wilcoxen, to wit: "What did you, as a member of the board, and in considering the valuation of the Southern Pacific railroad property for the purpose of the assessment for the year 1887, consider that the company intended by using the word 'franchise' there in its statement?"

LIII.

The court erred in overruling defendant's objection to the following question propounded by plaintiff's counsel to the witness, C. E. Wilcoxen, to wit: "Well, which franchise or what franchise did you suppose they referred to there?"

LIV.

The court erred in refusing to permit the witness, C. E. Wilcoxen, to be interrogated as to the evidence given by him before the
441 committee on judiciary of the assembly of the State of California on the 23rd day of February, 1889, in answer to questions of Mr. Lezynsky and Mr. Dibble.

LV.

The court erred in overruling defendant's objection to the following question put to the witness, John P. Dunn, viz: "What was intended by the State board to be meant and included in the expression of 'franchise' in that statement against the railroad company?"

LVI.

The court erred in overruling defendant's objection to the following question put to the witness, John P. Dunn, viz: "Well, when that report was filed and returned as sworn to, as it appears to be, by the Southern Pacific Railroad Company, returning a franchise within the State of California, what did you understand or the board understand to be meant by that railroad company in using that term?"

LVII.

The court erred in overruling defendant's objection to the following question put to the witness, John P. Dunn, viz: "Did he, or any other representative of the railroad company, claim before the board, at any meeting held in reference to the tax or assess-
442 ment of 1887, that the word 'franchise,' as used by it in its said statement, which you hold, was ambiguous in any repect, and included anything more than the State franchise?"

LVIII.

The court erred in overruling defendant's objection to the following question put to the witness, John P. Dunn, viz: "Well, did he claim that the word 'franchise', as returned by them, describing their franchise, was ambiguous in any respect?"

LIX.

The court erred in overruling defendant's objection to the following question put to the witness, John P. Dunn, viz: "Did you claim that the words in that statement, 'franchise within the State' included any Federal franchise which that road, the Southern Pacific, claimed to have?"

Stipulation as to Correctness of Statement.

It is hereby stipulated and agreed, by and between the plaintiff and defendant, that the foregoing statement on motion for a new trial herein is correct, and that the same may be approved,
443 allowed and settled by the court as now made, and may be used by the defendant as a statement herein timely made, served, approved, allowed, settled and filed herein, upon its motion for a new trial herein, and upon appeal, if necessary.

Dated this 6th day of June, 1893.

LANGHORNE & MILLER,
Attorneys for Plaintiff.

H. S. BROWN,
FOSHAY WALKER,
J. E. FOULDS,
Attorneys for Defendant.

Order of Court Approving, Allowing, and Settling Statement.

The foregoing statement on motion for a new trial herein is correct, and is hereby approved, allowed and settled, and ordered filed as a part of the record herein, this 19th day of June, 1893.

J. C. B. HEBBARD, *Judge.*

Order Overruling Motion for New Trial.

On the 23rd day of June, 1893, the court overruled the said motion for new trial by its order entered as follows:

(Title of Court and Cause.)

In this action the motion for a new trial coming on regu-
444 larly this day to be heard, and after argument by Messrs. Brown and Walker, counsel for defendant, and W. H. H. Hart, Esq., counsel for plaintiff, and the court desiring to hear no further argument, said motion is ordered submitted; and now the court being fully advised herein, it is ordered that the motion for a new trial in this cause be and the same is hereby denied. It is further ordered that a stay of execution for thirty (30) days be and the same is hereby granted.

Notice of Appeal.

On the 11th day of July, 1893, the defendant duly served and filed its notice of appeal herein as follows:

(Title of Court and Cause.)

To the clerk of said court and to The People of the State of California, plaintiff, and Messrs. Langhorne & Miller, attorneys for plaintiff:

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the State of California from the judgment therein made and entered in said superior court on the 3rd day of February, 1893, in favor of the plaintiff in said action and against the defendant therein, and from the whole thereof.

You will also please take further notice that the said de-
445 fendant hereby also further appeals from the order made and entered in said cause, in the said superior court, on the 23rd day of June, 1893, refusing and denying the motion of the said defendant for a new trial in said action, and from the whole of said order.

H. S. BROWN,
FOSHAY WALKER,
J. E. FOULDS,
Attorneys for Defendant.

Dated this 11th day of July, 1893.

Stipulation as to Correctness of Transcript.

(Title of Court and Cause.)

It is hereby stipulated and agreed, by the parties herein, that the foregoing printed transcript contains full, true and correct copies of the pleadings, papers, documents, exhibits and proceedings, therein referred to, being a full, true and complete copy of the record herein, and more particularly of plaintiff's amended complaint, defendant's demurrer, order of court overruling defendant's demurrer, defendant's answer, first amendments to defendant's answer, second amendments to defendant's answer, findings of fact and conclusions of law, judgment, statement on motion for a new trial, order overruling motion for new trial and notice of appeal, and that all
446 statements of fact in said transcript contained are true and correct so far as the same relate to dates of filing pleadings and papers and of making orders by the court.

It is further stipulated and agreed that the appeal in this case has been duly perfected, and that a good and sufficient undertaking on said appeal, in due form of law, has been properly executed and filed.

Dated this 28th day of Dec., 1893.

LANGHORNE & MILLER,
Attorneys for Respondent.

—— ——,
—— ——,
Attorneys for Appellant.

447 *Certificate of Clerk as to Correctness of Transcript.*

I, the undersigned, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court, in and for said city and county, do hereby certify that the foregoing printed transcript contains full, true and correct copies of the pleadings, papers, documents, exhibits and proceedings therein referred to, being a full, true and complete copy of the record herein, and more particularly of plaintiff's amended complaint, defendant's demurrer, order of court overruling defendant's demurrer, defendant's answer, first amendments to defendant's answer, second amendments to defendant's answer, findings of fact and conclusions of law, judgment, statement on motion for new trial, order overruling motion for new trial and notice of appeal, and that all statements of fact in said transcript contained are true and correct.

I hereby further certify, that the appeal in said cause has been duly perfected, and that a good and sufficient undertaking on said appeal, in due form of law, has been properly executed and filed.

Witness my hand and the seal of said court, this — day of ——, 1893.

—— ——, *Clerk,*
By —— ——, *Deputy Clerk.*

447½ Service and receipt of copy of within transcript admitted this 28th day December, 1893.

LANGHORNE & MILLER,
Attorneys for Respondent.

448 Filed Jan. 6, 1895.

Appeal from the superior court of San Francisco Co.—J. C. B. Hebbard, J.

For app't, H. S. Brown, J. E. Foulds, Foshay Walker; Wm. F. Herrin, of counsel.
For resp't, Att'y Gen'l Hart, A. R. Cotton, Langhorne & Miller.

In bank.

PEOPLE
vs.
SOUTHERN PACIFIC CO. } No. 15601.

By the COURT, M'FARLAND, J., dissenting:

Upon the authority of The People of the State of California *vs.* Central Pacific Railroad Co., No. 15600, this day decided, the court below is directed to modify the judgment by striking therefrom the amount allowed for interest prior to the entry of judgment and also the amount allowed for counsel fees to A. R. Cotton, and, as so modified, the judgment and order denying a new trial will stand affirmed.

Justices Van Fleet and Fitzgerald, being disqualified, did not participate in the foregoing opinion.

449 In the Supreme Court of the State of California.

PEOPLE
vs.
SOUTHERN PACIFIC COMPANY. } Cause No. 15601.

By the COURT, McFARLAND, J., dissenting:

Upon the authority of The People of the State of California *vs.* Central Pacific Railroad Co., No. 15600, this day decided, the court below is directed to modify the judgment by striking therefrom the amount allowed for interest prior to the entry of judgment and also the amount allowed for counsel fees to A. R. Cotton, and, as so modified, the judgment and order denying a new trial will stand affirmed.

Justices Van Fleet and Fitzgerald, being disqualified, did not participate in the foregoing opinion.

[Endorsed:] No. 15601. In the supreme court, State of California. The People, etc., *vs.* Southern Pacific Company.

450 In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error,
v.
SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error.

Petition for Allowance of Writ of Error.

To the honorable the justices of the supreme court of the State of California:

The Southern Pacific Railroad Company, a corporation and plaintiff in error herein, most respectfully represents to your honors that it is the defendant and plaintiff in error in the proceedings and action hereinafter mentioned, and that The People of the State of California is the plaintiff and defendant in error in said proceedings.

That said action was originally brought in the superior court of the State of California in and for the city and county of San Francisco on the 2nd day of January, 1891. On the 16th day of February, 1891, the defendant filed its demurrer therein. On the 12th day of September, 1892, the court, after full argument, overruled the said demurrer. On the 12th day of October, 1892, by leave of the court, the said defendant filed its answer therein, and thereafter, to wit, on
451 the 19th day of November, 1892, and the 11th day of January, 1893, by leave of the court, said defendant filed certain amendments to said answer.

On the 9th day of January, 1893, said cause came on regularly for trial on the issues raised by said complaint and answer as amended before the court without a jury, a jury having been waived by the parties, and was tried and submitted to the court for decision, and thereafter, to wit, on the 3rd day of February, 1893, the court made, signed, and filed its written findings of fact and conclusions of law therein in favor of said plaintiff and against said defendant.

That on the 3rd day of February, 1893, judgment was entered, pursuant to said findings, in favor of said plaintiff and against said defendant for the sum of $251,134.26, with interest thereon from the 27th day of December, 1887, at the rate of seven per cent. per annum, to date, amounting to $89,654.91, together with five per cent. upon said principal sum, amounting to the sum of $12,556.66; also for the sum of $18,835.06 as and for the counsel fee earned by Langhorne and Miller, as attorneys for plaintiff therein, and also the further sum of $6,278.31 as and for the counsel fee earned by A. R. Cotton, attorney for plaintiff therein, and for said plaintiff's costs and disbursements, amounting to the sum of $42.16.

Within the time allowed by law the said defendant served and filed its notice of intention to move for a new trial, and its statement on motion for a new trial was duly settled by the court and filed in said cause, and said motion for a new trial was thereafter
452 made and submitted to the court for decision. On the 23d day of June, 1893, the court, by an order duly made and entered, overruled and denied said motion for a new trial. On the 11th day of July, 1893, said defendant duly appealed from said judg-

ment and from said order denying said motion for a new trial to this honorable court, which, on the 6th day of January, 1895, modified said judgment by striking out therefrom the said sum of $89,654.91, allowed therein for interest, and the sum of $6,278.31, allowed therein for counsel fee earned by A. R. Cotton, and then and there affirmed said judgment as so modified and said order denying a new trial.

In said action and proceeding there was drawn in question the validity of a statute of or an authority exercised under said State on the ground of its being repugnant to the Constitution or laws of the United States and the decision was in favor of such its validity, and in the said action and proceeding there was also drawn in question the construction of a clause of the Constitution or of a statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, statute, or commission.

And the defendant and appellant in said action, plaintiff in error herein, being dissatisfied with the judgment made and entered in said action and the judgment of this honorable court in affirmance thereof, and feeling itself aggrieved thereby and by the said
453 action of said court in awarding a judgment in favor of The People of the State of California, plaintiff as aforesaid, defendant in error herein, and that under the evidence the judgment should have been in favor of the plaintiff in error, and that such judgment is contrary both to the law and the evidence, and that evidence material to the defense of the defendant therein, plaintiff in error herein, was erroneously excluded by said superior court upon trial of said action, comes now, by its attorneys, H. S. Brown, Foshay Walker, and J. E. Foulds, and petitions this honorable court for an order allowing said defendant, plaintiff in error herein, to prosecute a writ of error to the honorable Supreme Court of the United States under and in accordance with the laws of the United States in that behalf made and provided.

And also that an order be made fixing the amount of security which the defendant, plaintiff in error herein, shall give and furnish upon said writ, to operate as a supersedeas in said action, and that upon the giving of such security all further proceedings in the supreme court of the State of California and said superior court of the State of California in and for the city and county of San Francisco be suspended and stayed until the determination of said cause upon said writ of error by the said Supreme Court of the United States.

And your petitioner, as in duty bound, will ever pray, etc.

H. S. BROWN,
FOSHAY WALKER,
J. E. FOULDS,
Attorneys for Plaintiff in Error, Defendant and Appellant.

Allowed Feb. 6, 1895.
W. H. BEATTY,
Chief Justice of California.

453½ [Endorsed:] 2. No. 15601. In the supreme court of the State of California The People of the State of California, defendant in error, *vs.* Southern Pacific R. R. Co., plaintiff in error. (Copy.) Petition for allowance of writ of error. Service of the within — is hereby admitted this — day of ——, A. D. 189–. ——— ——, attorney for —. Filed February 7th, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy clerk. H. S. Brown, Foshay Walker, & J. E. Foulds, attorneys for pl'ff in error.

454 In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error.

Assignment of Errors.

The Southern Pacific Railroad Company, having petitioned said court for an order permitting it to prosecute a writ of error to the honorable Supreme Court of the United States from the judgment made and entered in said court, now makes and files with its said petition the following, and specifies the same as its assignment of errors herein and upon which it will rely for a reversal of said judgment upon said writ:

I.

The court erred in overruling defendant's demurrer to plaintiff's amended complaint for the reason that sections 3666, 3667, 3668, 3669, and 3670 of the Political Code of the State of California, under the provisions of which said action was instituted, are unconstitutional in this, that the said sections of the Political Code are in contravention of section 1 of the XIVth amendment to the Con-
455 stitution of the United States, in that by the provisions thereof the defendant is deprived of and denied the equal protection of the laws, and because by those sections burdens are placed upon corporations operating a railroad in more than one county that are not placed upon corporations operating a railroad in only one county.

II.

The court erred in overruling defendant's demurrer to plaintiff's amended complaint for the reason that in so far as the assessment of railroads operated in more than one county is concerned sections 4 and 10 of article XIII of the State constitution are in contravention of section 1 of the XIVth amendment to the Constitution of the United States, as thereby and thereunder persons or corporations owning such roads are deprived of property without due process of law and are denied the equal protection of the laws: hence the assessment and taxes are void.

III.

The decision of the court is against law because it appears from the evidence and findings that all of the property of the defendant

upon which the taxes which are the subject of this action were assessed by the State board of equalization was at the time of said assessment subject to a lien of the United States to secure bonds issued to defendant and to a mortgage to secure bonds of defendant issued and held by individuals, some of whom were residents of the State of California, and that no deduction was made from the valuation of said property for or on account of said incumbrances, although the same were well known to said board of equali-
456 zation, but said property was assessed at its full cash value, whereas all other property in the State of California, except that owned by railroad and other quasi-public corporations, was entitled to and received in its assessment for said fiscal year a deduction from its actual cash value of the amount of any mortgage, deed of trust, contract, or other obligation by which a debt is secured then subsisting upon it; that the said property of defendant was so assessed pursuant to the provisions of section 4 of article XIII of the constitution of the State of California, which is in conflict with the XIVth amendment to the Constitution of the United States, and by reason of the premises said assessment and the whole thereof and all taxes levied thereunder were and are null and void and of no effect, and no action can be maintained or judgment rendered therefor.

IV.

The decision of the court is against law because it appears from the findings that the defendant was at the time of the making of said assessment the owner and holder of certain franchises of great value derived from and held under and by virtue of certain acts of Congress of the United States of America, and it appears from the evidence that in estimating the value of the franchise, roadway, road-bed, rails, and rolling stock of defendant's railroad in the State of California and in making the assessment thereof under which the taxes were levied for which this action is brought the State board of equalization of the State of California included as an element of value and assessed the value of the Federal franchises aforesaid, but in making said assessment blended the same with
457 the other properties of defendant assessed by it in such a manner that it cannot be segregated therefrom, and therefore said assessment and the whole thereof and all the taxes levied thereunder and for which this action is brought are null, void, and of no effect, and no action can be maintained or judgment rendered therefor.

V.

The decision of the court is against law because it appears from the findings and evidence that in the counties of San Benito, San Bernardino, San Luis Obispo, and Santa Clara certain special school taxes had been by the boards of supervisors of said several counties duly levied in various school districts thereof through which the railroad of defendant ran for the year 1887, and a certain special tax in the city of Los Angeles, in the county of Los Angeles, by

the board of supervisors of said county, the rates whereof were included in and formed a part of the county rates of levy for that year and were levied upon the property of defendant and constitute a portion of the levies of the counties aforesaid upon which the said several county taxes sued for in this action are based; that the State board of equalization never in any manner apportioned the assessment made by it of the property of said defendant for said year to any of the school districts of either of said counties, as required by the provisions of section 10, article XIII, of the constitution of this State, but such apportionment was admitted to be made by the boards of supervisors of said several counties to their respective school districts and was and is null
458 and void; that by reason of the premises the rates of said county levies furnished to the State controller upon which the taxes for said counties sued for in this action are based and said taxes were not fixed and levied as required by the constitution and laws of this State, but are null, void, and of no effect, and no action or judgment can be maintained or rendered therefor.

VI.

The decision of the court is against law because counsel fees are allowed to plaintiff therein, whereas the complaint contains no allegation nor is there any evidence that any counsel fees have been incurred by plaintiff or that any sum or amount therefor has been audited by the State board of examiners as required by section 3668 of the Political Code of the State of California.

VII.

The decision of the court is against law because the evidence shows that the counsel fees allowed therein are not a reasonable or just compensation for legal services rendered by counsel for plaintiff in the institution and prosecution of this action, but that the same are purely speculative and contingent and are fixed at a much higher figure than the actual value of such services because entirely dependent upon the contingency of the success of the plaintiff in this action and upon the uncertainty and mere possibility of collection and upon supposed services which may hereafter be rendered by said counsel in connection with this action in other courts and places and in other proceedings which may or may not be taken or rendered.

459 VIII.

The decision of the court that plaintiff is entitled to a penalty of 5 per cent. upon the several principal sums found to be due by the findings of fact is against law for the reason that there is no evidence that any such penalty was added thereto on the 27th of December, 1887, or at any other time by the controller of State or any other officer of the State of California authorized to impose such a penalty.

IX.

The decision of the court is against law in this: That whereas by finding of fact No. 26 it is found that in making its assessment of defendant's property for the year 1887 the State board of equalization did not include, assess, or value any franchise or corporate power held or exercised by defendant under any act or acts of Congress, yet upon a comparison of such finding of fact with the opinion of the court upon which the same is based, as set forth in the statement on motion for a new trial, it is manifestly impossible to determine therefrom whether said finding of fact is made upon a consideration of the evidence tending to establish that such Federal franchise of defendant was assessed or included in the assessment of the State board of equalization of the property of defendant for the year 1887, and upon the preponderance of evidence upon that point in favor of plaintiff, or whether said finding is made upon the presumption of fact of the regularity of the proceedings of the State board of equalization, and that the same is unassailed by reason of the incompetency of all evidence upon the part of defendant tend-
460 ing to rebut such presumption and the consequent exclusion of such evidence from consideration by the court.

X.

The decision of the court is against law in this: That it appears by the findings of fact that the State board of equalization of the State of California did assess for the year 1887 the franchise of defendant, whereas it also appears from said findings that said franchise is, in whole or in part, held under and derived from the Government of the United States, and cannot therefore be the subject of taxation by any State, county, or municipal government.

XI.

The decision of the court is against law in this: That it appears from the findings of fact that the property of defendant assessed by the State board of equalization and upon which the taxes sought to be recovered by this action were imposed, was and is subject to a lien of the United States to secure the indebtedness of defendant to it, and that the Government of the United States has an interest and ownership therein to the extent of its said lien, and by reason of the premises all of said property is exempt from taxation by any State, county, or municipality.

XII.

The decision of the court is against law because it appears that the property of defendant was assessed by the State board of equalization under the provisions of section 10 of article XIII of the constitution of the State of California, and no provision is made by said constitution for the equalization of the assessed value thereof,
461 whereas all other property is entitled by said constitution to have its assessed value equalized by boards organized for the purpose of reviewing the action of assessors, and said provision of the

constitution of the State of California is therefore unequal in its operation; denies to the defendant and other property-holders similarly situated the equal protection of the laws, and deprives the owners of their property without due process of law, and is repugnant to the 1st section of the XIVth amendment to the Constitution of the United States, and void.

XIII.

The court erred in admitting in evidence that portion of the duplicate record of assessments of railways by the State board of equalization for the year 1887 relating to the assessment of the property of defendant for said year.

XIV.

The court erred in admitting in evidence that portion of the duplicate record of apportionment of railway assessments for the year 1887 having reference to the apportionment of the assessment of the property of defendant for the year 1887.

XV.

The court erred in permitting the witness W. W. Douglas to testify as to the non-payment of taxes by defendant.

XVI.

The court erred in permitting the witness W. W. Douglas to testify as to the non-payment of any portion of the taxes or interest or penalty.

XVII.

462 The court erred in permitting evidence as to the value of counsel fees to be introduced by plaintiff.

XVIII.

The court erred in denying defendant's motion for a nonsuit.

XIX.

The court erred in admitting in evidence Plaintiff's Exhibit 5 for the purpose stated.

XX.

The court erred in admitting in evidence Plaintiff's Exhibit 7 for the purpose stated.

XXI.

The court erred in sustaining the objection of plaintiff to the following offer of evidence, on the part of defendant, to be given by the witness L. C. Morehouse, namely:

"We offer to prove by this witness that at every session during every year of the existence of the State board of equalization, from

the year 1883 and prior to the year 1888, the State board of equalization, in making its assessment of the valuation of the property of the Southern Pacific Railroad Company, included in its total estimate of the value the Federal franchise held by that company by virtue of the acts of Congress of the United States which have been introduced in evidence, and that the valuation of the Federal franchise was blended with the general assessment of that company in such a manner as to be indistinguishable from it and not capable of separation."

XXII.

The court erred in permitting the following question to be put by counsel for plaintiff to the witness L. C. Morehouse, namely:

463 "Then, as a matter of fact, if the assessment against the franchise, roadway, road-bed, and rails of this company contained the Federal franchise, then the statement to you furnished by the railroad company including the same words also contained the Federal franchise?"

XXIII.

The court erred in permitting the following question to be put by counsel for plaintiff to the witness L. C. Morehouse, namely:

"And that in fixing the value which you assigned to the property represented by these words you only intended to include the property which was legally assessable under the State constitution?"

XXIV.

The court erred in sustaining plaintiff's objection to the following question to the witness E. W. Maslin, namely:

"From the various sources of knowledge which you have enumerated, please state to the court what elements were taken into consideration by the State board of equalization in making the assessment of these two companies for the year 1887."

XXV.

The court erred in sustaining the objection to the following question to the witness E. W. Maslin, namely:

"Did you hear any conversation between the members of the State board of equalization during the meeting when the assessment of this company was made for the year 1887, with reference to the elements that they proposed to and did include in the

464 assessments?"

XXVI.

The court erred in sustaining the objection to the following question to the witness E. W. Maslin, namely:

"At the time that the assessment of 1887 was made by the State board of equalization upon the property of the Southern Pacific Railroad Company, what was said and done at the meeting of the State board of equalization on that day in your presence?"

XXVII.

The court erred in disallowing defendant's offer of certain evidence by the witness E. W. Maslin; which offer was as follows:

"We now offer to prove by this witness that from the time of the organization of the State board of equalization in 1880 down to and including the year 1887 that board had every year considered the value of the Federal franchise—that is, the franchise derived from the United States by the acts of Congress, the Government of the United States—belonging to and owned by the Southern Pacific Railroad Company as an element of value in assessing the total value of the property of that railroad company, and that in 1888, in consequence of a decision of the Supreme Court of the United States upon the subject, the State board of equalization for the first time ceased to consider this Federal franchise as an element of value, and hence reduced their valuation by the sum of $3,000,000 on the Southern Pacific Railroad Company's property."

XXVIII.

465 The court erred in overruling defendant's objection to the following question put to the witness C. E. Wilcoxen, namely:

"All action taken by the board with reference to the assessment of railroads, and especially with reference to the Southern Pacific Railroad Company, were made matters of record either in the minutes of the board or in the assessment book of the board, were they not?"

XXIX.

The court erred in overruling defendant's objection to the following question put to the witness C. E. Wilcoxen, namely:

"But in regard to crossing bays or rivers or anything of that sort was that distance considered? Take, for instance, the bay of San Francisco to the Oakland mole. Did you assess that part of the bay as a portion of their road-bed?"

XXX.

The court erred in refusing to permit the witness C. E. Wilcoxen to be interrogated as to the evidence given by him before the committee on judiciary of the Assembly of the State of California on the 23rd day of February, 1889, in answer to questions of Mr. Lezynsky and Mr. Dibble.

XXXI.

The court erred in overruling the defendant's objection to the following question put to the witness John P. Dunn, namely:

"What was intended by the State board to be meant and in-
466 cluded in the expression of 'franchise' in that statement against the railroad company?"

XXXII.

The court erred in overruling defendant's objection to the following question put to the witness John P. Dunn, namely:

"Well, when this report was filed and returned as sworn to, as it appears to be, by the Southern Pacific Railroad Company returning a franchise within the State of California, what did you understand or the board understand to be meant by that railroad company in using that term?"

XXXIII.

The court erred in overruling defendant's objection to the following question put to the witness John P. Dunn, namely:

"Did he or any other representative of that railroad company claim before the board at any meeting held in reference to the tax or assessment of 1887 that the word franchise, as used by it in said statement which you hold, was ambiguous in any respect and included anything more than the State franchise?"

XXXIV.

The court erred in overruling defendant's objection to the following question put to the witness John P. Dunn, namely:

"Well, did he claim that the word franchise, as returned by them describing their franchise, was ambiguous in any respect?"

XXXV.

The court erred in overruling defendant's objection to the following question put to the witness John P. Dunn, namely:

467 "Did he claim that the words in that statement 'franchise within the State' included any Federal franchise which that road, the Southern Pacific, claimed to have?"

Wherefore, by reason of the foregoing assignment of errors and the petition of the defendant, plaintiff in error herein, for leave to prosecute a writ of error herein to the Supreme Court of the United States, the plaintiff in error submits its said petition and these assignments of error and prays for an order of this honorable court allowing it to prosecute such writ to said Supreme Court of the United States.

H. S. BROWN,
FOSHAY WALKER,
J. E. FOULDS,
Attorneys for Plaintiff in Error, Defendant, and Appellant.

467½ [Endorsed:] No. 15601. 2. Supreme court, State of California, department No. —. The People of the State of California, d'f'd't in error, *vs.* Southern Pacific Railroad Company, pl'ff in error. Assignment of errors. Service of the within — is hereby admitted this — day of ——, A. D. 189–. —— ——, attorney for —. Filed February 7th, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy clerk. H. S. Brown, Foshay Walker, and J. E. Foulds, attorneys for pl'ff in error.

468 In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent,
v.
SOUTHERN PACIFIC RAILROAD COMPANY, Appellant,

Order Allowing Writ of Error.

And now, on this 6th day of February, 1895, on motion of H. S. Brown, Foshay Walker, and J. E. Foulds, of counsel for appellant, it is ordered that a writ of error herein be, and is hereby, allowed, and in order to stay execution pending the writ of error the appellant shall file a supersedeas bond in the sum of six hundred thousand dollars.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

468½ [Endorsed:] No. 15601. 2. In the supreme court of the State of California. The People of the State of California respondent, *vs.* Southern Pacific R. R. Co., appellant. (Copy.) Order allowing writ of error. Service of the within — is hereby admitted this — day of ——, A. D. 189–. —— ——, attorney for —. Filed February 7th, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy clerk. H. S. Brown, Foshay Walker, & J. E. Foulds, attorneys for appellant.

469 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of California and The Southern Pacific Railroad Company, wherein was drawn in question the validity of a statute of or an authority exercised under the United States and the decision was against its validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of its being repugnant to the Constitution or laws of the United States, and the decision was in favor of such its validity, or wherein was drawn in question the construction of a clause of the Constitution or of a statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, statute, or commission, a manifest error hath happened, to the great damage

of the said Southern Pacific Railroad Co., as by its com-
470 plaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 6th day of April, 1895, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 6th day of February, in the year of our Lord one thousand eight hundred and ninety-five.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

W. J. COSTIGAN,
Clerk of the Circuit Court of the United States in and for the Ninth Judicial Circuit and Northern District of California.

Allowed this 6th day of February, 1895.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

471 I hereby certify that a copy of the foregoing writ of error was, on the 7 day of Feb'y, 1895, lodged in the clerk's office of the said supreme court of the State of California for the said defendant in error.

[Seal Supreme Court of California.]

T. H. WARD,
Clerk of the Supreme Court of the State of California,
By R. A. MARSHALL, *Deputy.*

471½ [Endorsed:] No. 15601. 1. —— court, county of ——, department No. —. Southern Pacific R. R. Co., plaintiff in error, *vs.* The People of the State of California, defendant in error. Writ of error. Service of the within — is hereby admitted this — day of ——, A. D. 189–. —— ——, attorney for —. Filed Feb. 7, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy. H. S. Brown, Foshay Walker, & J. E. Foulds, attorneys for pl'ff in error.

472 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the People of the State of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of

Washington, in the District of Columbia, on the 6th day of April, 1895, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California wherein The Southern Pacific Railroad Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this 6th day of Feb'y, 1895.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

472½ [Endorsed:] No. 15601. 1. In the supreme court of the State of California. The People of the State of California, defendant in error, *vs.* Southern Pacific R. R. Co., plaintiff in error. Citation. Service of the within citation is hereby admitted this 7th day of February, A. D. 1895. Langhorne & Miller, attorneys for def't in error. Filed Feb. 7, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy. H. S. Brown, Foshay Walker, & J. E. Foulds, attorneys for pl'ff in error.

473 *Bond.*

In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error,
v.
SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error.

Know all men by these presents that we, Southern Pacific Railroad Company, as principal, and A. N. Towne and Wm. H. Crocker, as sureties, are held and firmly bound unto the People of the State of California in the full and just sum of six hundred thousand dollars; for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 7th day of February, 1895.

Whereas the said action was originally brought in the superior court of the State of California in and for the city and county of San Francisco on the 2nd day of January, 1891, and on the 16th day of February, 1891, the defendant filed its demurrer therein; and
474 on the 12th day of September, 1892, the court, after full argument, overruled the said demurrer, and on the 12th day of October, 1892, by leave of the court, the said defendant filed its answer therein; and on the 19th day of November, 1892, and the 11th day of January, 1893, by leave of the court, said defendant filed certain amendments to said answer; and on the 9th day of January, 1893, said cause came on regularly for trial on the issues raised by said complaint and answer as amended before the court, without a jury, a jury having been waived by the parties, and was tried and sub-

mitted to the court for decision; and on the 3rd day of February, 1893, the court made, signed, and filed its written findings of fact and conclusions of law therein in favor of said plaintiff and against said defendant; and on the 3rd day of February, 1893, judgment was entered pursuant to said findings in favor of said plaintiff and against said defendant for the sum of $251,134.26, with interest thereon from the 27th day of December, 1887, at the rate of seven per cent. per annum to date, amounting to $89,654.91, together with 5 per cent. upon said principal sum, amounting to $12,556.66; also for the sum of $18,835.06, as and for the counsel fees earned by Langhorne and Miller, as attorneys for plaintiff therein, and also the further sum of $6,278.31, as and for the counsel fees earned by A. R. Cotton, attorney for plaintiff therein, and for said plaintiff's costs and disbursements, amounting to the sum of $42.16, and

within the time allowed by law the said defendant served and
475 filed its notice of intention to move for a new trial, and its statement on motion for a new trial was duly settled by the court and filed in said cause, and said motion for a new trial was thereafter made and submitted to the court for decision, and on the 23d day of June, 1893, the court, by order duly made and entered, overruled and denied said motion for a new trial, and on the 11th day of July, 1893, said defendant duly appealed from said judgment and from said order denying said motion for a new trial to this honorable court, which, on the 6th day of January, 1895, modified said judgment by striking out therefrom the said sum of $89,654.91, allowed therein for interest, and the sum of $6,278.31, allowed therein for counsel fee earned by A. R. Cotton, and then and there affirmed said judgment as so modified and said order denying a new trial;

And whereas upon the 6th day of February, 1895, the said Southern Pacific Railroad *Railroad* Company filed in said supreme court of the State of California its petition for an order allowing it to prosecute a writ of error to the Supreme Court of the United States and for an order of said court fixing the amount of security which it shall be required to give to the plaintiff in said action upon the prosecution of said writ of error, to operate as a supersedeas and stay of execution until said writ of error shall have been heard and determined in the said United States Supreme Court;

And whereas upon the 6th day of February, 1895, the said supreme court of the State of California, upon said petition duly
476 made and had, entered of record in said court an order allowing a writ of error in said action in favor of said Southern Pacific Railroad Company, plaintiff in error, from said judgment to the Supreme Court of the United States, and in said order also fixed the amount of the security which the said above-bounden principal should be required to give pending the determination of said cause in said Supreme Court of the United States and to stay execution herein in the sum of six hundred thousand dollars:

Now, the condition of this obligation is such that if the said Southern Pacific Railroad Company shall prosecute said writ of error to effect and answer all costs and damages if it shall fail to make good

its plea, then this obligation shall be void; otherwise it shall remain in full force and effect.

[Corporate Seal.]

SOUTHERN PACIFIC RAILROAD COMPANY,
By J. L. WILLCUTT, *Secretary.*
A. N. TOWNE.
WM. H. CROCKER.

477 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

A. N. Towne and Wm. H. Crocker, being duly and separately sworn, each for himself and not for the other says: I am one of the sureties upon the above undertaking, and reside in the city and county of San Francisco, State of California, and am a householder therein. I am worth the sum of six hundred thousand dollars in property situate in said State of California over and above all my just debts and liabilities, exclusive of property exempt from execution.

A. N. TOWNE.
WM. H. CROCKER.

Subscribed and sworn to before me this 7th day of February, 1895.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

478 The above bond upon writ of error is hereby approved and execution stayed pending the determination of said writ.
Dated this 7th day of February, 1895.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

478½ [Endorsed:] 2. No. 15601. In the supreme court of the State of California. The People of the State of California, defendant in error, *vs.* Southern Pacific Railroad Co., plaintiff in error. (Copy.) Bond. Service of the within — is hereby admitted this — day of ——, A. D. 189–. —— ——, attorney for —. Filed February 7th, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy clerk. H. S. Brown, Foshay Walker, and J. E. Foulds, attorneys for pl'ff in error.

479 *Return to Writ of Error.*

The answer of the judges of the supreme court of the State of California to the foregoing writ of error.

The record and all proceedings of the plaintiff whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the honorable the Supreme Court of the United States within mentioned at the day and place within named

in a certain schedule to this writ annexed, as within we are commanded by the court.

[Seal Supreme Court of California.]

T. H. WARD,
Clerk of the Supreme Court of the State of California,
By A. W. JOHNSON,
Deputy Clerk.

479½ [Endorsed:] 1. No. 15601. In the supreme court of the State of California. The People of the State of California, defendant in error, *vs.* Southern Pacific R. R. Co., plaintiff in error. Return to writ of error. Service of the within — is hereby admitted this — day of ——, A. D. 189–. —— ——, attorney for —. Filed —— —, 189–. —— ——, clerk, by —— ——, deputy clerk. H. S. Brown, Foshay Walker, attorneys for pl'ff in error.

480 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *ss:*

I, T. H. Ward, clerk of the supreme court of the State of California, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from one to 479, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The People of the State of California, defendant in error, *vs.* The Southern Pacific Railroad Company, plaintiff in error, as the same remain of record and on file in said office; also that the citation, writ of error, and return to writ of error attached hereunto are the original citation, writ of error, and return to writ of error issued in said cause.

In witness whereof I have caused the seal of the supreme court of the State of California to be hereunto affixed, at the city and county of San Francisco, in the State of California, this 27th day of February, 1895.

[Seal Supreme Court of California.]

T. H. WARD,
Clerk of the Supreme Court of the State of California,
By A. W. JOHNSON,
Deputy Clerk.

[Endorsed:] In the supreme court of the State of California. The People of the State of California, defendant in error, *vs.* Southern Pacific R. R. Co. Clerk's certificate. Service of the within — is hereby admitted this — day of ——, A. D. 189–. —— ——, attorney for —. Filed —— —, 189–. —— ——, clerk, by —— ——, deputy clerk. H. S. Brown, Foshay Walker, & J. E. Foulds, attorneys for pl'ff in error.

Endorsed on cover: Case No. 15,832. California supreme court. Term No., 560. The Southern Pacific Railroad Company, plaintiff in error, *vs.* The People of the State of California. Filed March 15, 1895.

Office Supreme Court U. S.
FILED.
AUG 1 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1894.

No. ~~943~~. 560

SOUTHERN PACIFIC RAILROAD CO.,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

Motion by Defendant in Error to Advance Case for Hearing.
Notice of Motion and Affidavit.

W. F. FITZGERALD,
Attorney General of California.

J. P. LANGHORNE,
J. H. MILLER,
for Defendant in Error.

SAN FRANCISCO:
W. A. Woodward & Co., Printers, 12 Sutter Street
1895

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

SOUTHERN PACIFIC RAILROAD CO.,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.
No. 948.

Motion by Defendant in Error to Advance the Case on the Docket and to Have it Set Down for a Particular Day for Hearing.

Now comes the People of the State of California, the defendant in error in the above entitled case, and moves the above entitled Court for an order advancing said case on the docket of said Court and setting the same down for hearing on a particular day. Said motion is made on the following facts and grounds:

1. This case was instituted by the People of the State of California against the Southern Pacific Railroad Company in the Superior Court of the State of California, in and for the City and County of San Francisco, to recover the State and County taxes alleged to be due and unpaid the State of California and thirteen Counties in said State, for the fiscal year 1887. The judgment of said Superior Court was in favor of the People of

the State of California. The Southern Pacific Railroad Company appealed from said judgment to the Supreme Court of the State of California, which Court on the 6th day of January, 1895, affirmed the judgment of the lower State Court subject to certain modifications shown by the decision of said Supreme Court. On the 6th day of February, 1895, said Southern Pacific Railroad Company sued out a writ of error from said decision of the Supreme Court of State of California to the Supreme Court of the United States, and in March, 1895, a transcript of the record on such writ of error was filed with the Clerk of this Court and the cased docketed therein. Defendant in error has entered its appearance herein.

2. That the special and peculiar circumstances existing as reasons for the advancement of this case on the docket of this Court are as follows:

(*a*) The plaintiff in error in its Assignment of Errors under said writ of error, and particularly in paragraphs I, II, III and XII thereof, claims that Sections 4 and 10 of Article XIII of the Constitution of the State of California and the statutes of the said State enacted thereunder providing for the assessment, apportionment and collection of State and County taxes upon the property of railroads operated in more than one county in said State, are illegal and void by reason of being in violation of Section 1 of the XIVth amendment to the Constitution of the United States. Such claim by plaintiff in error places in jeopardy and in a state of uncertainty the revenue system of the State of California provided by its Constitution and statutes, for the assessment, apportionment and collection of State and County taxes from railroads operated in more than one county in the State. Nearly all the railroads in said State are each operated in more than one county, and it appears from the official report of the Comptroller of said State for the year 1894, that the railroads so operated aggregate at least 4,430 miles within the State, that the revenues for the support of the State and County governments

are in a great measure derived from taxes upon railroads operated in more than one county, and that such taxes amounted in 1894 to at least $668,000.00. Therefore, it is a matter of great interest and importance to the people of the State of California to have this Court hear and finally determine as soon as possible, whether or not the said revenue provisions of the State Constitution and statutes of the State of California are in violation of the XIVth amendment to the Constitution of the United States.

(*b*) Under the said decision of the Supreme Court of the State of California there will be due the defendant in error by the plaintiff in error at the time of the hearing of this motion on the first Monday in October, 1895, principal and interest upon the judgment for taxes and percentage thereon, the sum of $313,118.00, exclusive of the amount allowed for counsel fees, and pending the determination of this case by this Court, the State of California and thirteen counties therein cannot collect their revenues under and awarded by said decision for the support of the State and county governments to their great inconvenience and loss, and therefore a speedy determination of this case by this Court is a matter of great importance to the People of the State of California.

3. The facts upon which the foregoing grounds for this motion are based, will more fully appear from the transcript of the record of the case on file and from the affidavit of J. P. Langhorne, of counsel for defendant in error, attached hereto and filed herewith, and said record and affidavit are hereby referred to and by such reference made a part of this motion.

W. F. FITZGERALD,
Attorney-General of the State of California.

J. P. LANGHORNE,
JOHN H. MILLER,
For Defendant in Error.

[Title of Court and Cause.]

Affidavit of J. P. Langhorne in Support of Motion to Advance Case.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

J. P. LANGHORNE, being first duly sworn, doth on oath depose as follows: That he is one of the attorneys and counsel for the People of the State of California, defendant in error herein. That this case was instituted by the People of the State of California against the Southern Pacific Railway Company in the Superior Court of the State of California in and for the City and County of San Francisco, to recover the State and county taxes alleged to be due and unpaid the State of California and thirteen counties in said State for the fiscal year 1887. The judgment of said Superior Court was in favor of the People of the State of California. The Southern Pacific Railroad Company appealed from said judgment to the Supreme Court of the State of California, which Court on the 6th day of January, 1895, affirmed the judgment of the lower State Court, subject to certain modifications shown by the decision of said Supreme Court. On the 6th day of February, 1895, said Southern Pacific Railroad Company sued out a writ of error from said decision of the Supreme Court of the State of California to the Supreme Court of the United States, and in March, 1895, a transcript of the record on such writ of error was filed with the clerk of this Court and the case docketed therein. That defendant in error has entered its appearance therein.

That the special and peculiar circumstances existing as reasons for the advancement of this case on the docket of this Court are as follows:

The plaintiff in error in its assignment of errors under said writ of error, and particularly in paragraphs I, II, III, and XII thereof, claims that Sections 4 and 10 of Article XIII of the Constitution of the State of California and the Statutes of said State enacted thereunder providing for the assessment,

apportionment and collection of State and County taxes upon the property of railroads operated in more than one County of said State, are illegal and void by reason of being in violation of Section 1 of the XIVth Amendment to the Constitution of the United States. Such claim by plaintiff in error places in jeopardy and in a state of uncertainty the revenue system of the State of California provided by its Constitution and Statutes for the assessment, apportionment and collection of State and County taxes from railroads operated in more than one County in the State. Nearly all the railroads in said State are each operated in more than one County, and it appears from the official report of the Comptroller of said State for the year 1894, that the railroads so operated aggregate at least 4,430 miles within the State; that the revenues for the support of the State and County Governments are in a great measure derived from taxes upon railroads operated in more than one County, and that such taxes amounted in 1894 to at least $668,000.00. That it is therefore a matter of great interest and importance to the people of the State of California to have this Court hear and finally determine whether or not the said revenue provisions of the State Constitution and Statutes of the State of California, are in violation of the XIVth Amendment to the Constitution of the United States.

That under the decision of the Supreme Court of the State of California, there will be due the defendant in error by the plaintiff in error at the time of the hearing of this motion on the first Monday in October, 1895, principal and interest upon the judgment for taxes and percentage, the sum of $313,118.00, exclusive of the amount allowed for counsel fees, and pending the determination of this case by this Court, the State of California and thirteen Counties therein can not collect their revenues under and awarded by said decision for the support of the State and County Governments, to their great inconvenience and loss, and therefore a speedy determination of this

case by this Court is a matter of great importance to the people of the State of California.

Further deponent saith not.

J. P. LANGHORNE.

Subscribed and sworn to this 24th day of July, 1895, before me, Daniel Sloney Notary Public in and for the City and County of San Francisco, State of California.

[NOTARIAL SEAL.]

[Title of Court and Cause.]

Notice of Motion to Advance Cause.

To Southern Pacific Railroad Company, Plaintiff in Error and to Mr. Chas. H. Tweed, its Counsel:

You will please take notice that the defendant in error by its Counsel, will on the first Monday in October, 1895, at the opening of the Supreme Court of the United States on that day, or as soon thereafter as Counsel can be heard, in the Court room of said Court, in the Capitol Building at Washington, District of Columbia, make and submit to the said Court, the foregoing motion in writing (hereto attached) to advance this case upon the docket of said Court and to have it set down for a particular day for hearing. Said motion will be made upon the facts and grounds set forth in said written motion which is hereby referred to and by such reference made a part of this notice. There will be used upon the hearing of said motion and submitted therewith the affidavit of J. P. Langhorne, hereto attached and the record on file with the Clerk of said Court in this case.

Respectfully,

W. F. FITZGERALD,
Attorney-General of the State of California.

J. P. LANGHORNE,
JOHN H. MILLER,
For Defendant in Error.